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Special issue

Extractive Industries in the North:

What About Environmental
and Indigenous Peoples Law?

Guest editor

Tore Henriksen

Content

Extracting industries in the North: What about Environmental Law and Indigenous Peoples' Law?

Guest Editorial Note

A conference with the above-mentioned titled was organized 17–19 November 2013 at Faculty of Law, University of Tromsø, the Arctic University of Norway. The research group on Sami Law and Indigenous Peoples' Law and the K.G.Jebsen Centre for the Law of the Sea co-organized the conference.

The background for the conference is the increased focus on the Arctic and its possible large deposits of minerals on land and in the subsoil of the Arctic Ocean. These new possibilities lead to new challenges. The organizers invited researchers to come to Tromsø to discuss the implications of extractive industries for the Indigenous Peoples' Rights and the protection of the environment. At the conference, 17 papers were presented. Nine of these papers are published in this issue of Nordic Environmental Law Journal.

Some of the papers raise general questions relating to Indigenous Peoples' Law and Environmental Law while others look into the situation in Arctic countries. *Susann Skogvang* in her paper lays out the main question of the conference: If rights of indigenous peoples and environmental concerns have been adequately addressed in extractive industries of the North. She is particularly concerned with the practice of the state of giving the responsibility of fulfilling international obligations in respect of indigenous peoples to the companies involved in extraction. There is a reciprocal relationship between environmental law and human rights as indigenous peoples is dependent on sustainable use of the resources for their survival and by the recognition that their traditional uses of the natural resources contributes to sustainable development. *Mattias Åhren* provides an overview and assessment of human rights and use of natural resources in the territories of indigenous peoples. He gives insight to the development of human rights over three periods where the right to property, right to non-discrimination and right of self-determination have developed to include indigenous peoples. The right of indigenous peoples to property was accepted early but was in practice difficult to implement because their traditional use of land and resources was not recognised as relevant in establishing property right. The new understanding of the right

to non-discrimination as treating different cases differently meant a requirement of the state to accept the practices of the indigenous peoples as basis of property rights. The property right gives the indigenous peoples a right to refuse extracting industries access to their territory and a right of prior consent. He also argues that although the state may expropriate land to provide for extracting industries, the requirement of proportionality will seldom be fulfilled due to the negative consequences of the industry for the indigenous people. Åhren further argues that the right of self-determination is applicable although its content is not yet clear. It involves a right to influence the outcome of the decision-making. In her paper, *Ingvild Jakobsen* gives an overview and assessment of the international legal framework for protection of the environment from effects of extracting industries. There are different types of risks related to such activities spanning from pollution to destruction of habitats. The presentation is limited to the central legal norms and instruments. The point of departure is the principle of sovereign rights over natural resources and the duty not cause environmental damage to the environment of other states and to areas beyond national jurisdiction. This principle is found in the UN Convention on the Law of the Sea and in the Convention on Biological Diversity, which is presented by the author. The obligation under the first mentioned convention to protect the marine environment also include land-based activities such as mining that may affect the marine environment. Although the Convention on the Law of the Sea implies obligations to act in relation of both land-based and activities at sea, they are according to Jakobsen not specific as to what states are required to do. The Convention on Biodiversity includes both procedural as well as substantial obligations and are applicable to extracting industries on land and at sea. They include an obligation to take measures to regulate activities, which is likely to have adverse effects on biodiversity. Jakobsen also addresses the regional cooperation on the matter through the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR convention) and the Arctic Council. Even if the OSPAR Convention both regulates the environmental impacts of extractive industries on land and at sea it is applicable to only parts of the Arctic. The Arctic Council has primarily been concerned with mapping the environmental status of the Arctic. However, it has also issued guidelines on offshore gas and oil in the Arctic. The Arctic Council has done work on best practices on ecosystem-based management, which may be relevant for regulating extractive industries.

There are six papers with a national perspective on extractive industries and implications for indigenous peoples and the environment covering Norway, Russia, USA, Greenland, Finland and Sweden. *Ole Kristian Fauchald* addresses the legal framework for regulating the environmental consequences of mining for minerals in Norway. The responsibility for ensuring that environmental considerations are taken into account is shared between different authorities with the risk of fragmentation: mining authorities (license to mining), local government (land use and planning, environmental impact assessment) and environmental protecting agency

(pollution permissions). Although environmental considerations are relevant and obligatory under the Mineral Act, they do not qualify as minimum obligations of result. The author also questions how and when these considerations come into play. For instance, the requirement of mining license is dependent on information on the anticipated production level to be provided by the company. The mining activity must be consistent with the zoning plans adopted by the municipality. Further, plans regulating mining activities may require environmental impact assessment before they may be adopted. However, there are ambiguity concerning when and how such assessments may be undertaken and how environmental considerations can be included in the plans. Pollution from mining activities may originate both from discharges from the mining activtities and from the treatment of wastes from the mining. EU legislation is made applicable in Norway through the EEA agreement both on discharges and waste. Particularly challenging is the use of marine waste deposits. The Norwegian legislation is inadequate in relation to treatment of the wastes. The Nature Diversity Act is applicable. The author particularly draw the attention to the requirement under the Act to base decisions on adequate knowledge base when public decisions are taken. Further, the requirement of applying the precautionary principle when taking such decisions when there is inadequate information on the effects on nature. The author stresses that these principles are relevant when considering using the seabed of fjords as waste deposits.

Ruslan Garipov sets out to investigate the Russian legislation to protect traditional livelihood of indigenous people, which are affected by extraction of natural resources. Indigenous peoples make 400.000 individuals occupying 60 % of Russian territory. Large parts of the natural resources of Russia are located in these areas. The extracting industries causes *inter alia* pollution and restriction on the access to resources in areas of indigenous peoples. According to the author, the Russian Constitution guarantees the rights of indigenous peoples consistent with international law and sets out to protect traditional living area of small communities. The value of these provisions are weakened by the fact that Russia has not accepted central human rights of indigenous peoples. Another major challenge is the lack of implementation of legislation set up to protect areas and to ensure against negative environmental impacts.

The point of departure of the paper of *Michael Burger* is the litigation on the drilling of Shell on the continental shelf of the Beaufort Sea off the north coast of Alaska. Exploitation permits issued by federal authorities have been challenged in court by both indigenous peoples' associations and environmental NGOs. The author describes the arguments by the parties through different and competing storylines, spanning from homeland to frontier, reflecting linkage and view of the nature. The purpose of the paper is to assess the purpose of US natural resources law and whether it functions as a mediation of disputes. The land claims of Alaska was according to the author resolved through the 1971 Alaska Native Settlement

Claims. It is a pending question whether the act also is applicable to hunting and fishing rights in the waters of Alaska. The act provided the indigenous peoples with property rights and other economic benefits. Burger goes on to present the legal framework for offshore oil and gas drilling, which includes extensive requirements of environmental review during the different phases of exploration and exploitation, including of the effects on wildlife. Before the federal court, representatives of indigenous peoples portrayed the areas as their ancestral land whereas the oil company and federal government argued it neutral place. The court found that the drilling permit had not adequately addressed the effects on wildlife. In later rounds, some of groups of the indigenous peoples has described the areas as a developing world, in the sense that indigenous peoples may benefit from the oil industry through jobs and economic growth. The author argues that the US system is consistent with international human rights of indigenous peoples. However, he is somewhat uncertain whether the Free, prior, informed consent is complied with, which hinges on the uncertainty regarding the status of rights to fish and hunt at sea.

Kristina Labba in her paper focuses on the major threat to reindeer herding in Sweden, which is loss of land. It includes mining activities. Reindeer herding is depending on large areas for grazing in different seasons and for calving. In recent years, more licenses for exploration and exploitation of minerals have been granted in these areas. The purpose of the paper is to identify the inconsistencies between the property rights and cultural rights of the Sami and the Swedish mining and environmental legislation. The Mining Act is liberal and has been subjected to criticism for not including international standards for protection of human rights of indigenous peoples (such as free, prior, informed consent). The author illustrates through a concrete example how the interests of indigenous people has to yield to the interests of mining. The Swedish mining policy and legislation has been criticised by the UN special rapporteur that asks for giving the Sami interests higher weight. A pending complaint to CERD may have consequences for Swedish legislation.

The focus of the contribution of *Rutherford Hubbard* is mining in Greenland and the role of free, prior and informed consent (FPIC). The failure of obtaining FPIC poses according to him significant risk for the investors. He argues for an increased role of corporations to improve FPIC. The author presents the legal basis for FPIC and discusses whether the extended autonomy provided to the indigenous people of Greenland complies with the requirement of FPIC. He argues against, as the decision-making on mining is located to an agency where the representatives of the elected bodies have limited influence. The different impact assessments to be undertaken before licences are given provides limited place for the indigenous people according to the author. He argues that contact and dialog should be maintained through traditional cultural processes. Hubbard argues that the risk posed to companies are reduced if they themselves provides for the FPIC. The responsibility of the state is fulfilled, as it is required to ensure that such consent is present.

The object of the investigation of *Timo Koivurova and Anna Petrétei* is the new Finnish Mining Act and how Sami rights and interests have been taken into account in its development. They have reviewed different drafts. The early drafts were developed based on Article 27 of the Covenant on Political and Civil Rights including both substantive and procedural rights and obligations. As reindeer herding is not an exclusive Sami activity, a new draft was developed based on consultations with the Sami Parliament. Under the final draft, it was the rights of indigenous peoples that were to be protected. The authors investigate the practice under the act. There have been accorded few permits in Sami areas. The authors have interviewed representatives from the mining industry. They see the protection of Sami interests as an obstacle to mining in these areas. The interviewees also highlighted the negative image of the industry created by media. An early dialog with the Sami Parliament focusing on the positive sides of mining may be one measure to improve the standing of the mining industry.

Tore Henriksen

Extractive Industries in the North – What about Environmental Law and Indigenous Peoples' Rights?

*Susann Funderud Skogvang**

1. Introduction

The Research Group on Sami Law and Indigenous Peoples' Rights and the K.G. Jebsen Centre for the Law of the Sea at The Faculty of Law, University of Tromsø – The Arctic University of Norway, hosted an International Law Symposium in Tromsø in November 2013. We invited leading experts on environmental law and indigenous peoples' rights to Tromsø for discussions of legal questions regarding extractive industries in the North. The main question to be addressed was whether indigenous peoples' rights and environmental concerns are adequately addressed in extractive industry-processes in the North. The topics are at the core of the priority areas of the Faculty of Law and at University of Tromsø and are also highly relevant from a global perspective.

The topicality of legal research in this field is unquestionable. It is therefore a great pleasure that the outcome of the conference is a series of important new research papers on extractive industries. This special thematic issue of the *Nordic Environmental Law Journal* on extractive industries in the North hopefully will also contribute to further legal discussions on this subject. In this article, I will give a brief introduction to the legal questions and the topics discussed at the conference.[1]

2. Topicality

There are seven billion people in the world. More than 370 million of them, spread across some 70 countries worldwide, are considered to be indigenous.[2] Most indigenous peoples live in rural and vulnerable areas, such as the Arctic.[3] Lands and natural resources are vital for their livelihood and culture. Therefore, to a larger extent than do urban people, they depend on rights to natural resources and the management of natural resources for their subsistence. The interest in preserving these resources from a long-term perspective is significant. The close relationship with the environment also makes indigenous peoples particularly vulnerable to the impairment of their rights through environmental harm.[4]

Indigenous territories in the North host rich deposits of oil, gas and different types of valuable minerals.[5] This fact makes international

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[1] For more, see Susann Funderud Skogvang: "Legal questions regarding mineral exploration and exploitation in indigenous areas", *Michigan State International Law Review* 2013, pp. 321–345.

[2] See UN Permanent forum on indigenous issues webpage: "Indigenous Peoples, Indigenous Voices – Factsheet" available at: http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (last visited April 2014)

[3] Anton, Donald K. & Dinah L. Shelton: *Environmental Protection and Human Rights*, New York Cambridge University Press, 2011, p. 545.

[4] Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/25/53, p. 20.

[5] Andy Whitmore (ed.): *Pitfalls and Pipelines. Indigenous Peoples and Extractive Industries*, 2012, [hereinafter *Pitfalls and Pipelines*] p. 4–5 and Asbjørn Eide:«Indigenous Self-Government in the Arctic, and their Right to Land and

commercial industries very eager to enter indigenous territories. Permitting extractive industries access to such areas is fairly controversial and has been vigorously debated for years.[6] There are numerous reports of ongoing human rights violations related to extractive industry activities in indigenous territories.[7] These violations include the pollution of drinking water, the loss of grazing land and forced relocation of peoples. Different UN entities concerned with the rights of indigenous peoples, such as the UN Permanent Forum on Indigenous Issues and the UN Special Rapporteur on the Rights of Indigenous Peoples, have lately expressed great concern about extractive industries.[8]

The ongoing conflicts in Sweden (Kallak and Rönnbäcken) are illustrative of the controversy surrounding mining in vulnerable areas and on reindeer pasture land. *Labba* has elaborated on these conflicts between mining and reindeer-herding in Sweden in her article.[9] *Garipov* has presented a similar picture for Russian reindeer-herding.[10] A study on environmental impacts of mining in Sweden documents that mining companies are violating the Swedish Environmental Code.[11] This causes great concern for the Sami and for other local communities in Sweden.

The traditional Sami areas in Norway have been subjected to several conflicts between mining activities and the traditional Sami livelihood.[12] Today, in particular, two controversial ongoing mining projects on Norwegian Sami territories are the root of heated debates: the Repparfjord/Ulveryggen-project by Nussir ASA[13] and the Biedjovaggi-project by Arctic Gold AB.[14] Neither of these projects is compatible with reindeer husbandry.[15] Reindeer grazing are an area-demanding industry, and every part of the area covers different vital needs for the animals. Even loss of small areas may disturb the reindeer herding dramatically.[16] Furthermore, Nussir ASA plans to use traditional coastal Sami fishing grounds to dispose of waste from the Reppar-

Natural Resources», in *The Yearbook of Polar Law,* Leiden/Boston: Martinus Nijhoff, 2009, p. 246.

[6] Reports of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: *Extractive industries operating within or near indigenous territories* (2011) A/HRC/18/36 and *Extractive Industries and Indigenous Peoples* (2013) A/HRC/24/41 [hereinafter *Extractive industries and indigenous peoples*] with further references.

[7] *Pitfalls and pipelines* page xxi.

[8] Permanent Forum on Indigenous Issues [hereinafter PFII], Report on the Twelfth Session (20–31 May 2013), U.N. Doc. E/3013/43 (2013), and *Extractive industries and indigenous peoples*, (2013) A/HRC/24/41.It can be mentioned that PFII have presented reports on how extractive industries have negative impact on the lives of indigenous peoples in every session since it was created in 2002. See further note 6.

[9] See Kristina Labba: "Mineral Activities on Sámi reindeer Grazing Land in Sweden", pp. 93–95.

[10] See Ruslan Garipov: "Extractive Industries and Indigenous Minority Peoples' Rights in Russia", pp. 67–75.

[11] Arne Müller: *Smutsiga miljarder – den svenska gruvboomens baksida*, (Dirty billions – the downside of swedish mining), Skellefteå: Ord & visor förlag, 2013.

[12] See NOU 1997:4 *Naturgrunnlaget for samisk kultur*, pp. 132–137.

[13] See www.nussir.no for more information about their ongoing projects (last visited April 2014).

[14] See www.arcticgold.se for more information about their ongoing projects (last visited April 2014).

[15] See letter from Fylkesmannen (County administrator) in Finnmark to Miljøverndepartementet (The Ministry of the Environment) of 30 November 2012 available at www.nussir.no/environmental-pub/zoning/2012-11-30%20%20Fylkesmannen%20i%20Finnmark%20-%20brev%20til%20MD%20etter%20megling.pdf (Last visited April 2014), and Arctic Gold, Plandokument Biedjovaggi, (Plan for Local development plan Biedjovaggi) p. 110, available at http://www.kautokeino.kommune.no/Finnmark/Kautokeino/kautokeinok.nsf/Attachments/0E9D080EB73F99BE412579C600364E4A/$FILE/Planprogram+-+revidert+utgave+etter+offentlig++ettersyn+med+r%C3%B8d+tekst,+datert+07.02.12.pdf (last visited April 2014). See also Mikkel Nils Sara: "Land Usage and Siida Autonomy", *Arctic Review on Law and Politics* 2011 p. 138–158.

[16] See more Reindriftsforvaltningen (Norwegian Reindeer Husbandry Administration) available at www.reindrift.no/index.gan?id=298&subid=0 (last visited April 2014). See also Mikkel Nils Sara: "Land Usage and Siida Autonomy", *Arctic Review on Law and Politics* 2011 p. 138–158.

fjord/Ulveryggen-project.[17] This project raises debates about how this comply with Norway's obligations under international law pertaining to the rights of indigenous peoples and environmental law, to which I will return at the end of this section.

There is an increased interest in extractive industries, both mineral activities and oil and gas extraction in the North.[18] The interest comes in response to the growing global demand for minerals, oil and gas.[19] The Norwegian government is very interested in facilitating for extractive industries in the north of Norway.[20] This development causes particularly great concerns in traditional Sami areas in Norway where property rights are still unclear.[21]

Another concern is that it might be *de facto* unclear who is responsible for respecting indigenous peoples' rights and environmental obligations. States are seldom involved in extractive industries,[22] which is instead performed by international companies. The extraction of resources, therefore, involves a three party-relationship among indigenous peoples, states, and extractive industry-companies. States are *de jure* obliged to "respect, protect and fulfill" the rights of indigenous peoples according to various human right instruments.[23] International companies have no such obligations, despite general public sentiment that the private sector should also respect, protect, and fulfill human rights, including the rights of indigenous peoples.[24] States are obliged to make sure that companies act in accordance with the current legislation. It follows from the U.N. Guiding Principles that: "State's protective role entails ensuring a regulatory framework that fully recognizes indigenous peoples' rights over lands and natural resources and other rights that may be affected by business activities."[25] However, in practice, no one is fully responsible for indigenous matters, as the state parties trust in corporate social responsibility.[26] A recent example from Norway is the already mentioned Repparfjord-case. The Ministry of Local Government and Modernisation adopted the needed local development plan for mining in the Repparfjord-area. Concerning the resistance from the affected reindeer-herding Sami peoples in the area, the Ministry states:

> A basis for the decision is that the developer, in consultation with the reindeer-herding industry, agrees on mitigation measures that render possible the continuation of reindeer-husbandry and the practicing of Sami culture in the area.[27]

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[17] www.nussir.no.

[18] Asbjørn Eide: «Indigenous Self-Government in the Arctic and their Right to Land and Natural Resources», *The Yearbook of Polar Law*, Leiden/Boston: Martinus Nijhoff, 2009, p. 246–247.

[19] *Pitfalls and Pipelines*. *Indigenous Peoples and Extractive Industries*, 2012, p. xv.

[20] Strategi for mineralnæringen (Strategy for the extractive industry), available at http://www.regjeringen.no/pages/38261985/mineralstategi_20130313.pdf. (last visited April 2014).

[21] Øyvind Ravna: "The First Investigation Report of the Norwegian Finnmark Commission", *International Journal on Minority and Group Rights* 2013, pp. 443–457.

[22] *Pitfalls and pipelines. Indigenous Peoples and Extractive Industries*, 2012, unless the state has organized state owned companies, as Norway and Sweden have done with Statoil and LKAB.

[23] UN Guiding Principles On Business & Human Rights: Implementing The United Nations Protect, Respect, And Remedy Framework, at 3, U.N. Doc. HR/PUB/11/04 (2011) [herienafter Guiding Principles] *available at* http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. (last visited April 2014).

[24] See Guiding Principles p. 1–2.

[25] *Id* p. 2 and Forum on Bus. & Human Rights, Statement by Professor James Anaya Special Rapporteur on the Rights of Indigenous Peoples (Dec. 5, 2012). http://unsr.jamesanaya.org/statements/forum-on-business-and-human-rights-2012-statement-by-professor-james-anaya, (last visited April 2014).

[26] *Id*. See also *Pitfalls and Pipelines*. *Indigenous Peoples and Extractive Industries*, 2012, p. 345.

[27] The Ministry of Local Government and Modernisation decision (Kvalsund kommune – innsigelse til regulering-

In my opinion this is a clear example of "outsourcing" the responsibility for respecting the rights of indigenous peoples.

Another aspect of corporate social responsibility is respecting and protecting the environment.[28] Extractive industries in vulnerable arctic areas may adversely affect the environment. The "precautionary principle" expressed in several international instruments, such as the Convention on Biological Diversity (CBD),[29] the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR-convention),[30] and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972 (London Convention), with its 1996 Protocol (London Protocol),[31] seems weak when competing with commercial mining industries.[32] The core of the precautionary principle is reflected in Principle 15 of the Rio Declaration:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[33]

Governments and mineral companies should take the time needed to discover all possible negative impacts and listen to environmental experts in this regard.[34] The abovementioned Repparfjord-project is a suitable case-study in this regard. The Norwegian Institute for Marine Research, The Directorate of Fisheries, and The Norwegian Environment Agency have warned against allowing Nussir ASA to spill poisonous copper-waste in the Repparfjord.[35] The warnings have not been heeded by the Norwegian government.[36] This puts Norway in company with the few countries worldwide that allow waste disposals from mining in the sea: the Philippines,

splan for Nussir og Ulveryggen) of 20th of March 2014, p. 7.

[28] For more about Corporate Social Responsibility (CSR), see William B. Werther, Jr. and David Chandler: *Strategic Corporate Social Responsibility: Stakeholders in a Global Environment*, Sage, USA, 2010, for instance p. 20.

[29] The Convention on Biological Diversity (CBD), 5 June 1992. The precautionary principle is expressed in the Preamble.

[30] The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR-convention) article 2 (2) a.

[31] The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972, (London Convention) 13 November 1972. See further Philippe Sands and Jacqueline Peel, with Adriana Fabra and Ruth MacKenzie: *Principles of International Environmental Law* (3rd ed.), 2012, page 563–564.

[32] International Maritime Organization webpage: "Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter", available at www.imo.org/OurWork/Environment/LCLP/Pages/default.aspx., (last visited April 2014).

[33] Rio Declaration on Environment and Development, Rio de Janeiro, 3–14 June 1992

[34] *Pitfalls and Pipelines. Indigenous Peoples and Extractive Industries*, 2012, chapter 1.1: Overview of impacts of Extractive Industries on Indigenous Peoples.

[35] See hearing submission from The Norwegian Institute for Marine Research, Havforskningsinsituttet "Høring – Reguleringsplan med konsekvensutredning for planlagt gruvedrift I Nussir og Ulveryggen i Kvalsund kommune", 15 Sept. 2011, available at http://www.imr.no/filarkiv/2012/01/hi-rapp_23-2011_til_web.pdf/nb-no,(last visited on April 2014) and statements from The Norwegian Environment Agency, Miljødirektoratet: "Fraråder utslippstillatelse i Repparfjorden" available at http://www.miljodirektoratet.no/no/Nyheter/Nyheter/Nyhetsarkiv/2012/5/Frarader-utslippstillatelse-i-Repparfjorden/ (last visited April 2014), and Directorate of Fisheries: "Livet i fjorden i fare om vi tillet utslipp", available at http://www.fiskeridir.no/fiske-og-fangst/aktuelt/2012/1012/livet-i-fjorden-i-fare-om-vi-tillet-utslepp (last visited April 2014).

[36] See the Ministry of Local Government and Modernisation decision (Kvalsund kommune – innsigelse til reguleringsplan for Nussir og Ulveryggen) of 20 March 2014, and the statement of the Ministry of Trade and Fishery (Kommentarer til innsigelsessak ifm reguleringsplan for gruvedrift på Nussir og Ulveryggen i Kvalsund kommune) of 13 February 2014, available at www.regjeringen.no/pages/38624159/Kommentarer_innsigelsessak_reguleringsplan.pdf (last visited April 2014). Note that mining in Repparfjord is still dependent on a discharge permit from the Norwegian Environment Agency.

Turkey, Indonesia and Papua New Guinea.[37] Mine waste into the sea releases fine particles into the ocean that may choke and drive away sea life and spreads, blanketing large areas of the sea floor.[38] Most countries, including China, the United States, Australia and Brazil, ban sea disposal of mining-waste. The London Protocol takes in its article 3 a precautionary approach to dumping as a general obligation. In essence, dumping is prohibited, except for materials on an approved list.[39] The London Convention and Protocol does not apply to internal waters, and is therefore not applicable for the Repparfjord-case in Norway, according to the London Convention article III (3). However, the general obligations regarding a precautionary approach in the OSPAR-convention article 2 (2) a, and also the United Nations Convention on the Law of the Sea article 210 applies to dumping also in internal waters. The fact that the most significant research communities in Norway have warned against dumping in Repparfjord can imply that Norway in this regard does not comply with the precautionary principle.

3. The connection between indigenous peoples' rights and environmental law in this field

Why did the conference focus on both the rights of indigenous peoples *and* environmental law? An actual correspondence between indigenous use of natural resources and considerations behind the protection of the environment has been recognized in international law for a long time.[40] The UNEP annual Report from 2012 expresses that "Environmental sustainability and the promotion of human rights are increasingly intertwined goals and foundations for strengthening the three dimensions of sustainable development."[41] Indigenous rights and environmental rights have also developed and intertwined in the international legal context, and the interaction between indigenous resource utilization and environmental protection has been a key aspect of environmental law conventions. International law recognizes that indigenous communities are dependent on the sustainable use of biological resources in their communities and recognize the importance of indigenous use to achieve the goal of sustainable development. The close relationship is expressed in several international instruments. I will elaborate on this in the following.

The Stockholm Declaration of 1972 stated in Principle 14 that indigenous peoples have the right to control their lands and their natural resources and to preserve their traditional way of life.[42] The Brundtland Commission of 1987 clearly stated the relationship between indigenous interests and needs and the global interest in

[37] *Pitfalls and pipelines. Indigenous Peoples and Extractive Industries*, 2012, p. 13 and Natur og ungdom: Sjødeponi i Repparfjorden ville ikke blitt tillatt i Kina, available at http://nu.no/naturmangfold/sjoedeponi-i-repparfjorden-ville-ikke-blitt-tillatt-i-kina-article4167-230.html. (last visited April 2014).

[38] *Pitfalls and pipelines. Indigenous Peoples and Extractive Industries*, 2012, p. 13 and Robert Moran, Amanda Preichelt-Brushett and Roy Young: "Out of Sight, out of Mine: Ocean Dumping of Mine Wastes", *World Watch* 22 (2) 2009.

[39] See more "The London Convention and Protocol. Their role and contribution to protection of the marine environment", available at www.imo.org (last visited April 2014).

[40] Anja Meyer: «International Environmental Law and Human Rights: Towards the Explicit Recognition of Traditional Knowledge», *RECIEL* 10 (1) 2001, p. 39.

[41] United Nations Environment Programme (UNEP) Annual Report 2012, p. 56–57.

[42] Stockholm Declaration on the Human Environment, adopted 16 June 1972, UN Doc. A/CONF.48/141 Rev.l at 3 (1973) Principle 14.

conservation and the sustainable use of natural resources. The report highlighted in particular the need to respect indigenous peoples' decisions and decision-making bodies to ensure responsible resource utilization and conservation of the environment.[43] This was further specified at the Rio Conference in 1992, and is reflected both in the Rio Declaration on Environment and Development, Agenda 21 and the Convention on Biological Diversity. The Rio Declaration Principle 22 states:

> Indigenous peoples and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.[44]

Agenda 21 proposed several measures to achieve sustainable development.[45] It follows from chapter 26 that States shall establish arrangements to recognize the value of indigenous communities, indigenous traditional knowledge and traditional management of natural resources. In addition, chapter 17 about the management of marine resources is concerned with the interaction between indigenous utilization of resources and the principle of sustainable development.

Also the Convention on Biological Diversity (CBD) article 8 j) and the preamble call for state parties to pay adequate attention to indigenous peoples' culture and traditional knowledge and practices relevant for sustainable use of biological diversity in the management of natural resources. States are required to have good processes for the use and protection of natural resources, ensuring indigenous peoples' participation in the management.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007[46] is also based on the view that there is a close correlation between the indigenous exploitation of natural resources and the principle of sustainable development. This view is most clearly expressed in the preamble, which states that States recognize that "respect for indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment."

It is thus expressed that indigenous knowledge, culture and customary practices contribute to achieving sustainable and equitable development.

A recent expression of the connection between human rights, including the rights of indigenous peoples, and environmental law was made by the independent expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox.[47] He has, together with a number of scholars and lawyers, thoroughly researched human rights obligations relating to the environment.[48] This research was recently pub-

[43] Report of the World Commission on Environment and Development: Our Common Future. Transmitted to the General Assembly as an Annex to Development and International Co-operation: Environment. March 1987.

[44] Rio Declaration on Environment and Development,Rio de Janeiro, 3–14 June 1992, UN Doc. A/CONF.151/26 (Vol. I) article 22.

[45] United Nations Conference on Environment & Development, Rio de Janerio 3–14 June 1992 AGENDA 21

[46] United Nations Declaration on the Rights of Indigenous Peoples, Resolution adopted by the General Assembly13 September 2007, UN Doc. A/RES/61/295.

[47] Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/25/53.

[48] *Id.* About the methodology he states: To ensure that the study was as thorough as possible, he sought and received substantial pro bono assistance from academics and international law firms. With their help, thousands of pages of material were reviewed, including texts of

lished in 14 different thematic reports.[49] Based on the findings in the research project, he concluded that human rights law includes procedural and substantive obligations relating to the environment.[50]

Concerning international law on the rights of indigenous peoples, he highlighted five main points. These five state obligations are so clearly formulated that I chose to include them here:

> Firstly, States have a duty to recognize the rights of indigenous peoples with respect to the territory that they have traditionally occupied, including the natural resources on which they rely. Secondly, States are obliged to facilitate the participation of indigenous peoples in decisions that concern them. The Special Rapporteur has stated that the general rule is that "extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent," subject only to narrowly defined exceptions (A/HRC/24/41, para. 27). Thirdly, before development activities on indigenous lands are allowed to proceed, States must provide for an assessment of the activities' environmental impacts. Fourthly, States must guarantee that the indigenous community affected receives a reasonable benefit from any such development. Finally, States must provide access to remedies, including compensation, for harm caused by the activities.[51]

These obligations are based in a thorough study of international law.[52] The ILO convention no. 169 concerning indigenous and tribal peoples in independent countries and UNDRIP specifically address the rights of indigenous peoples. Human rights bodies have also interpreted other international human rights agreements to protect these rights.[53] The abovementioned obligations are therefore interpretations that "have reached generally congruent conclusions."[54]

4. Final remarks

The world needs minerals, and it is not realistic to stop industrial development. But, the adverse environmental effects of extractive industries are a worldwide problem, and it is relevant to note that human consumption exceeds the earth's capacity at a tremendous tempo. In only eight months, humanity exhausts the earth's budget of resources for the whole year.[55] Indigenous peoples also need minerals. However, there is no need to hurry, as the mineral resources will not go anywhere. Traditional indigenous cultures, such as reindeer husbandry, are at stake and cannot be resurrected once erased. It is therefore necessary to clarify the rights of indigenous peoples, the potential adverse effects on such rights, and the environmental impact of extractive industries before anyone starts exploring and exploiting.

agreements, declarations and resolutions; statements by international organizations and States; and interpretations by tribunals and treaty bodies.", A/HRC/25/53 p. 4.

[49] *Id*.

[50] Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/25/53, page 21.

[51] Id.

[52] See note 44.

[53] Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/25/53, page 20.

[54] Id.

[55] Global Footprint Network: "Earth overshoot Day 2013", available at http://www.footprintnetwork.org/en/index.php/gfn/page/earth_overshoot_day/ (last visited April 2014)

International Human Rights Law Relevant to Natural Resource Extraction in Indigenous Territories – An Overview

*Mattias Åhrén**

Abstract

The article surveys the relevance of indigenous peoples' human rights with regard to natural resource extraction in territories traditionally used by them, with a focus on the rights to self-determination, culture, and, in particular, property.

The article articulates how indigenous peoples' right to self-determination may be of relevance to resource extraction in indigenous territories, although uncertainty prevails as to the scope of the right when applied to indigenous peoples. The article further outlines how the right to culture in principle has the potential to halt resource extraction in indigenous territories. Still, the threshold for the right to apply is so high that it will only occasionally allow indigenous peoples to prevent resource extraction. The article concludes that the most relevant right in the context of natural resource extraction in indigenous territories is the right to property. As a general rule, this right allows indigenous communities to offer or withhold their consent to resource extraction in territories traditionally used by them. The exception is when indigenous territories can be legitimately expropriated. Often, however, expropriation may not be an option, due to difficulties associated with meeting the legitimate aim, and, in particular, the proportionality, criteria.

1. Introduction

Recent years have witnessed an ever increasing drive to extract minerals and fossil fuels. Much of what remains of such resources is situated in territories traditionally used by indigenous peoples. As a consequence, resource extraction is having widespread, most often negative, effects on indigenous peoples' societies, cultures, and livelihoods.[1] Therefore, it is only natural that the issue as to how natural resource extraction relates to the human rights of indigenous peoples have propelled to the forefront of the indigenous rights regime. All three UN institutions that specifically address indigenous rights – the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and, in particular, the Special Rapporteur on the Rights of Indigenous Peoples (SRIP) – have identified the relationship between resource extraction and indigenous rights as a priority area.

What rights then, do indigenous peoples possess with regard to resource extraction in territories traditionally used by them? This article aims to provide an overview over the human rights framework that governs this relationship. It does so by analyzing the position international law has taken towards indigenous land and natural resource rights during three time-periods. First, the article outlines classical (colonial) international law's position on indigenous land rights. The article then surveys contemporary human rights norms relevant to resource extraction in

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[1] Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya; "Extractive Industries and indigenous peoples", A/HRC/24/41, para. 1

indigenous territories, where time-period 2 is international law prior to the emergence of evolved understandings of "peoples" and "equality", and time-period 3 is the period subsequent to these developments. Although wide spectra of human rights potentially come into play in the context of resource extraction in indigenous territories, the article focuses on the rights to self-determination, culture and property,[2] where the latter right is understood in light of the right to equality.

2. The first time-period; the classical international legal system

From its inception in the wake of the Peace of Westphalia (1648), international law came to rest on two perceptions of profound importance to the indigenous rights regime. First, it defined "peoples" not in terms of groups united by common ethnicity and culture. Rather, the aggregate of the individuals that happened to reside within the borders of the states that took form during this era were deemed to constitute peoples, for international legal purposes. Second, state sovereignty became the constitutional principle of international law, replacing natural law theories. As sovereigns, states were free to formulate international norms that served their interests.[3]

International law largely emerged for the purpose of facilitating European imperialism.[4] The European realms wished to rely on international norms to justify placing other continents under their hegemony and control. Invoking the principle of state sovereignty, the European states declared that under international law, among others indigenous peoples – due to the primitive nature of their societies – had failed to establish both sovereign and proprietary rights over their traditional lands. Therefore, the European realms were legally entitled to occupy such lands. The outlined theory is often referred to as the *terra nullius* doctrine. As indicated, this doctrine has two elements. The first relates to the political status of indigenous peoples, the second to their capacity to establish private rights over land.

As to the first element, classical international law recognized only states as international legal subjects. Indigenous peoples' societies did not qualify for statehood, since the European realms – and as a consequence international law – declared indigenous peoples' societies as uncivilized, i.e. as insufficiently "European".[5] Invoking the principle of state sovereignty, the European states declared that such societies could hold no sovereign rights over territories.

With regard to the second element, the *terra nullius* doctrine professed that indigenous peoples cannot establish proprietary rights over lands and natural resources either.[6] This con-

[2] For another analysis of the relationship between resource extraction in indigenous territories and indigenous rights that takes the rights to self-determination, culture and property as points of departure, see Funderud Skogvang, "Legal Questions regarding Mineral Exploration and Exploitation in Indigenous Areas", in Michigan State International Law Review, Vol. 22:1, pp. 321–345.

[3] Lauterpacht, "The Grotian Tradition in International Law", in *British Year Book of International Law*, 23 (1946), p. 29, Koskenniemi, *From Apology to Utopia – The Structure of International Legal Argument* (Cambridge University Press, 2005), pp. 115–121, and Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004), p. 42

[4] Kymlicka, "Beyond the Indigenous/Minority Dichotomy?", in *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Allen and Xanthaki eds. (Studies in International Law Vol. 30, 2011), p. 183, Crawford and Koskenniemi, *International Law* (Cambridge University Press, 2012), p. 15, and Simpson, "International law in diplomatic history", in Crawford and Koskenniemi, *supra*, p. 27

[5] Gilbert, *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (Transnational Publishers, 2006), pp. 22–23

[6] Gilbert, *supra* note 5, pp. 24–26

clusion followed from indigenous land uses being deemed insufficiently similar to European agrarian practices. Uncultivated land could not constitute property. Legally relevant occupation of land could only occur through European style agriculture.[7] Again, the principle of sovereignty gave the European realms the prerogative to declare this theory law.

In other words, Europe professed a "*dynamic of difference*" to justify placing indigenous territories under their realm of sovereignty.[8] Indigenous peoples were viewed as mere "*ghosts in their own landscapes*".[9] This position would remain unchanged well into the 1900s. Throughout this time-period, European lawyers understood international law to provide different norms for inter-European relations compared with relations between European states and other, uncivilized, entities.[10]

3. The second time-period; contemporary international law prior to evolved understandings of "equality" and "peoples"

3.1 Introduction

Although human rights ideas had circulated earlier, it was only in the post-World War II era that human rights formally became a concern of international law.[11] The UN Charter identifies promotion of human rights as one objective of the World Organization. Following the adoption of the Universal Declaration on Human Rights (UDHR) (1948), the UN subsequently adopted the Convention on the Elimination of Racial Discrimination (CERD) (1965) and the Covenants on Civil on Political Rights (CCPR) and on Economic, Social and Cultural Rights (CESCR), respectively (1966). CERD is relevant for the present purposes because the fact that an entire convention is dedicated to the right to non-discrimination underscores the centrality of the right to the contemporary human rights system, but also because CERD Article 5 (d) (v) enshrines the right to property. In CCPR and CESCR, common Article 1 on the right to self-determination and CCPR Article 27 on the right to culture are of particular relevance.

3.2 The right to property, understood in light of the right to equality

An international legal system that rests heavily on the principle of equality cannot reasonably uphold *terra nullius* and other doctrines that profess that indigenous peoples can *per se* hold no or only limited rights over land. Consequently, the incorporation of the right to non-discrimination into the international legal system soon resulted in international and domestic courts rejecting the *terra nullius* doctrine as inherently discriminatory.[12]

The rejection of the *terra nullius* doctrine implied acknowledgement in principle of that indigenous communities' traditional land uses es-

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[7] Locke, *Two Treatises of Government*, pp. 309, and 312–315, and Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995), p. 72

[8] Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", in Harward International Law Journal 40 (1999), pp. 24–25

[9] Huff, "Indigenous Land Rights and the New Self-Determination", in 16 Colo. J. Int'l Envtil. L. Pol'y 295 (2005), p. 298

[10] Koskenniemi, "International law in the world of ideas", in Crawford and Koskenniemi, *supra* note 4, p. 54, Simpson, *supra* note 4, pp. 25–45, and, generally, Anghie, *Imperialism*, *supra* note 3

[11] Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*, revised ed. (University of Pennsylvania Press, 1996), p. 104

[12] Tully, "The Struggles of Indigenous Peoples for and of Freedoms", in *Political Theory and the Rights of Indigenous Peoples*, Ivison, Patton and Sanders eds. (Cambridge University Press, 2000), p. 54, Anghie, *Imperialism*, supra note 3, p. 111, and Castellino, "The Right to Land, International Law & Indigenous Peoples", in *International Law and Indigenous Peoples*, Castellino and Walsh eds., (Martinus Nijhoff Publisher, 2005), pp. 92–101

tablish property rights.[13] Recognition *in principle* does, however, not necessarily mean acknowledgment of rights *in practice*. Despite formal recognition, indigenous communities continued to struggle when seeking recognition of property rights over lands traditionally used. The reason can be found in (i) the intrinsic connection between the rights to property and non-discrimination, and (ii) how the latter right was understood at the time.

If first addressing the link between the rights to non-discrimination and property, it follows directly from the nature of the latter right. The right to property is not a right to be provided with property. It merely requires that all must be free to acquire property on equal basis with others, and that, once property has been acquired, it is not arbitrarily taken. In other words, at its core, the right to property is a particular aspect of the right to non-discrimination.[14] As a consequence, the understanding of the right to non-discrimination directly impacts on the scope and content of the right to property

As to the understanding of the right to non-discrimination, when the right was first incorporated into the human rights system, it did not oblige states to consider cultural and ethnic differences within the state when designing laws and policies. For instance, it was sufficient that the state provided one educational system, based on the values, interests and language of the majority culture, as long as all children, irrespective of ethnic and cultural background, had equal access to such education. In short, equality meant only that equal cases be treated equally.[15] We now start to grasp how the understanding of the right to non-discrimination influence on indigenous communities' possibilities to achieve recognition of property rights over land.

As seen, with the rejection of the *terra nullius* doctrine, it had been established that indigenous communities "traditional use" of land result in property rights. But "traditional use" is not a term of art. Regional and domestic courts must flesh out its more precise content. Although variations occur, generally speaking, most jurisdictions consider a land area "traditionally used" that has been used for a period of time and to a certain degree, i.e. the use must have been sufficiently continuous and intense. To establish ownership rights, the use must, in addition, have been exclusive.

But "intense", "continuous" and "exclusive" are not terms of art either. Rather, such terms are defined by a cultural context. For instance, nomadic Sami reindeer herders surely have different understandings of what amounts to intense and continuous uses, compared with Scandinavian farmers.

Here, the understanding of equality becomes relevant to indigenous communities' possibilities to gain recognition of property rights over lands traditionally used. As seen, the conventional understanding of equality allowed states to provide only one educational system, based on the val-

[13] Wiessner, "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples", in 41 Vanderbilt Journal of Transnational Law (2008), p. 1154, Lenzerini, "Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples", in Texas International Law Journal, Vol. 42 (2006), p. 167, Macklem, "Indigenous Recognition in International Law: Theoretical Observations", in Michigan Journal of International Law, Vol. 30 (2008), pp. 184–185, Tully, "The Struggles", *supra* note 12, p. 54, Anghie, *Imperialism*, *supra* note 3, p. 111, and Castellino, supra note 12, pp. 92–101

[14] See e.g. the formulation of UDHR Article 17 and CERD Article 5 (d) (v), and further Waldron, *The Right to Private Property* (Clarendon Paperbacks, 1998), pp. 21–24, and Krause, "The Right to Property", in *Economic, Social and Cultural Rights – A textbook*, 2nd edn., Eide, Krause and Rosas eds. (Martinus Nijhoff Publishers, 2001), pp. 191–192.

[15] Makkonen, *Equal in Law, Unequal in Fact: Racial and ethnic discrimination and the legal response thereto in Europe*, doctoral dissertation presented at the Faculty of Law at the University of Helsinki, 5 March 2010, pp. 92–95

ues of the majority culture. The same applied to domestic property right law. The conventional understanding of equality did not oblige states to culturally adjust criteria necessary to fulfil to establish property rights over lands through traditional use. Rather, as understood at the time, the right to non-discrimination accepted domestic legal systems that provided that only land uses common to the majority culture resulted in property rights. It allowed domestic courts etc. to employ the majority people's perception of what amounts to intense, continued and exclusive use, also in cases concerning whether an indigenous community had established property rights over land through land uses common to its culture.

In sum, the above explains why indigenous communities faced great difficulties when seeking recognition of property rights over territories traditionally used, although the right to equality had been incorporated into international law. The rejection of the *terra nullius* doctrine implied formal recognition of indigenous property rights over land. Still, in practice these rights remained elusive. To illustrate, one can return to the Sami example. If, when evaluating whether a nomadic Sami reindeer herding community has established property rights over land, a court applies intensity and continuity criteria derived from Scandinavian style agriculture, it is very difficult for the reindeer herding community to have property rights recognized.

3.3 The right to self-determination

As mentioned, during this the second time-period, the right to self-determination became part of international law, as reflected in the UN Charters' reference to the "principle" of self-determination of peoples,[16] and CCPR and CESCR common Article 1's proclaimation that "*[all] peoples have the right to self-determination*". At the time, however, both the UN Charter and the 1966 Covenants were understood to refer to "peoples" only in the meaning the aggregate populations of states or territories.[17] In other words, classical international law's position that what groups constitute peoples is a matter of citizenship, not of ethnicity or culture, was confirmed. Consequently, indigenous peoples continued to enjoy no peoples' rights under international law.

3.4 The right to culture

CCPR Article 27 provides that persons belonging to minorities shall not be denied the right, in community with other members of the group, to enjoy their own culture. The wording suggests a limited relevance to indigenous peoples. The phrase "*shall not be denied the right*" indicates that states are supposed to remain neutral and not actively protect any particular culture within the state. In addition, it suggests a very high threshold for the provision to apply. Only actions that completely deny enjoyment of culture are outlawed. Finally, nothing in CCPR Article 27 submits that the provision covers culture in the meaning livelihoods and other land uses. The UN Human Rights Committee (HRC) has, however, contributed to an evolved understanding of Article 27 that renders the provision relevant to the relationship between indigenous rights and resource extraction in indigenous territories.

In the *Kitok Case*, the HRC confirmed that although CCPR 27 does not refer to indigenous peoples, the provision nonetheless applies to

[16] Articles 1 (2) and 55

[17] See UN GAOR, 6th session, Third Committee, 366th meeting, para. 29, and 397th meeting, paras. 5–6, and E/CN.4/Sub.2/L.625, paras. 77 and 80. See also Alston, *Peoples' Rights*, Alston ed. (Oxford University Press, 2005), pp. 260–261, Cassese, *Self-determination of Peoples: a Legal Reappraisal* (Cambridge University Press, 1995), pp. 14–23, 47–52 and 61–62 and 39–42, Crawford, *The Creation of States in International Law*, 2nd edn. (Clarendon Press, 2006), pp. 112–114, and Hannum, *supra* note 11, pp. 41–42.

such groups.[18] It clarified that in the context of indigenous peoples, the right to culture the provision enshrines embraces traditional livelihoods.[19] In *Ominayak v. Canada*, the HRC affirmed its principal conclusions in *Kitok* and held that resource extraction in the aboriginal Lubicon Lake Band's traditional territory amounted to a violation of CCPR Article 27, as these activities effectively destroyed the community's traditional hunting and fishing grounds.[20] In other words, the HRC established that resource extraction that prevents an indigenous community from pursuing traditional livelihoods is forbidden.

In the two *Länsman Cases*,[21] the Committee nuanced the picture when CCPR Article 27 forbids resource extraction in indigenous territories. The HRC held that not only resource extraction that completely prevents continued exercise of traditional livelihoods and other culturally based land uses is unlawful. CCPR Article 27 also forbids competing activities that effectively denies indigenous communities' continuous engagement in such land uses. The HRC declared that

> "Article 27 requires that a member of a minority shall not be denied his right to enjoy his own culture. Thus, measures whose impact amounts to a denial of the right will not be compatible with the obligations under article 27 … measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27".[22]

Hence, the threshold before a violation of the right to culture occurred was still high, although marginally lowered compared with the wording ("*denied*") of CCPR Article 27. Resource extraction that effectively prevented an indigenous group from pursuing its traditional livelihoods or other culturally based land uses was now forbidden. Once that threshold was met, resource extraction was absolutely forbidden, irrespective of potential benefits of the project to society as a whole.[23]

3.5 Conclusion

By the end of the second time-period, the right to self-determination was yet to apply to indigenous peoples. Consequently, there was no link between this right and resource extraction in indigenous territories. It had been formally acknowledged that indigenous communities' traditional use of land results in property rights. But since such rights were, largely speaking, not recognized in practice, also the right to property had little impact on resource extraction in indigenous territories. The right to culture could potentially deny industrial activities access to indigenous traditional territories, but only in rare cases.

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[18] Formally, CCPR Article 27 applies to individuals only. Notwithstanding, the provision indirectly protects also the cultural identity of the group as such. See further Åhrén, *The Saami Traditional Dress & Beauty Pageants* (Tromsö, 2010), pp. 77–80.

[19] *Ivan Kitok v. Sweden*, Comm. No. 197/1985, views adopted 27 July 1988

[20] *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada,* Comm. No. 167/1984, views adopted 26 March 1990

[21] *Ilmari Länsman et al v. Finland*, Comm. No. 511/1992, views adopted 26 October 1994, and *Jouni E. Länsman et al v. Finland* Comm. No. 671/1995, views adopted 30 October 1996

[22] *Jouni Länsman II*, *supra* note 21, para. 9.4

[23] For an in depth outline of the content of CCPR Article 27 up and until the *Länsman Cases*, see Scheinin, "The Right to Self-Determination under the Covenant on Civil and Political Rights", in *Operationalizing the Right of Indigenous Peoples to Self-Determination*, Aikio and Scheinin eds. (Åbo Akademi University, 2000), pp. 193–207.

4. The third time-period; contemporary international law subsequent to evolved understandings of "equality" and "peoples"

4.1 The right to property, understood in light of the right to equality

Section 3.2 explains how the right to non-discrimination, when it was incorporated into the contemporary human rights system, merely required that equal cases be treated equally. With time, however, it was increasingly recognized that *formal equality*, in the sense that states refrain from actively promoting the majority culture, does not necessarily result in *equality in practice*.[24] Rather, also states that claim to be formally neutral between cultures tend to adopt legislation and policies based on the values and interests of the majority culture. For instance, only the majority language can in most instances be officially used, and the majority culture is regularly promoted by the educational system. The majority's views and cultural assumptions are likely to become the norm.[25] In sum, also in formally neutral states, all cultures do not enjoy the same chance to prosper, or even to survive.

The new understanding of equality generated a paradigm shift in international law. The right to non-discrimination evolved to take on a second facet. The European Court on Human Rights' (ECHR) ruling in *Thilmmenos v. Greece* illustrates this development well. Here, the ECHR initially noted that

> "[t]he Court has so far considered the right [to non-discrimination] … violated when States treat differently persons in analogous situations without providing an objective and reasonable justification".

The Court then proceeded to declare that it

> "now considers that this is not the only facet of the [right to non-discrimination]. The right not to be discriminated against … is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different".[26]

The position taken by the ECHR has been echoed in a large number of other international legal sources.[27] It would appear that this evolved understanding of equality, or justice if one wants, has been largely accepted by states and beyond. This suggests that an international customary norm has crystalized that provides that the right to non-discrimination no longer merely entails that equal cases be treated equally. In addition, the right to equality now obliges states to treat different situations differently. This second facet of the right to non-discrimination is highly relevant to the indigenous rights regime. From it logically follows that it is no longer equality if a

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[24] Koskenniemi, *From Apology to Utopia, supra* note 3, pp. 5–6, Walker, "Plural Cultures, Contested Territories: a Critique of Kymlicka", in Canadian Journal of Political Science, Vol. 30, No. 2 (1997), pp. 215–216, and Shachar, *Multicultural Jurisdictions – Cultural Differences and Women's Rights* (Cambridge University Press, 2001), pp. 23 and 73

[25] Mancini and de Witte, "Language Rights and Cultural Rights: A European Perspective", in *Cultural Human Rights*, Francioni and Scheinin eds. (Martinus Nijhoff Publishers, 2008), p. 251, and Young, "Together in Difference: Transforming the Logic of Group Political Conflict", in *The Rights of Minority Cultures*, Kymlicka ed. (Oxford University Press, 1995), p. 163

[26] *Thilmmenos v. Greece*, Appl. No. 34369/97, Judgement of 6 April 2000

[27] To mention just a few, see e.g. HRC General Comment No. 18: Non-discrimination, A/45/40, Annex VI/A, paras. 7 and 8, UN Committee on Economic, Social and Cultural Rights General Comment No. 20, Non-discrimination in economic, social and cultural rights (article 2, para. 2), E/C.12/GC/20, paras. 8–9, 12, 36 and 39, and the Committee on the Elimination of Racial Discrimination, General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/GC/32.

state provides education, social services etc. accustomed to the majority culture, irrespective of whether all citizens – regardless of cultural and ethnic background – have equal access to such services. Rather, states must offer education, social services etc. accustomed to indigenous individuals' cultural background. For instance, it would appear that indigenous children are entitled to the same access to education in and on their mother tongue, as children belonging to the majority population are to education in their language. But the logical implications of the evolved understanding of equality do not end at the spheres of education, social services etc. The very nature of the evolved understanding of equality suggests that it is also profoundly important to indigenous rights over lands and natural resources, due to the articulated intrinsic connection between the rights to non-discrimination and property.

To the extent the outlined evolved understanding of equality has crystalized into a customary international norm, it would seemingly follow that the right no longer allows domestic property laws that are based solely on land uses common to the majority culture. Rather, domestic laws should acknowledge that different spheres of society use lands in different ways. It would be discriminatory to design – or maintain – domestic legal systems that provide that property rights over land arise as a result of land uses common to the majority culture, but not as a result of more fluctuating land uses customary to indigenous peoples. As James Anaya notes, "*non-discrimination requires recognition of the forms of property that arise from the traditional or customary land tenure of indigenous peoples, in addition to the property regimes created by dominant society*".[28]

More precisely, the contemporary understanding of the right to equality obliges domestic courts to adjust intensity, continuity and exclusivity criteria to the culture of the people whose property rights over lands and natural resources are being examined. If a domestic court surveys whether an indigenous community has established property rights over land through traditional use, the court should evaluate whether the use has been sufficiently intense, continuous and exclusive based on what constitutes intense, continuous and exclusive use in that indigenous culture. For instance, if a Sami reindeer herding community seeks recognition of property rights over its traditional territory, the domestic court should evaluate whether the reindeer herding pursued has been sufficiently intense and continuous based on what is common to the Sami nomadic reindeer herding culture. The court should not apply standards set by Scandinavian style agriculture. Accordingly, in theory, the evolved understanding of equality should result in acknowledgment also in practice of indigenous communities holding property rights over territories traditionally used. And indeed, international legal sources have responded in the way the articulated theory predicts.

The Inter-American Court and the Inter-American Commission on Human Rights have in a rich jurisprudence confirmed that against the backdrop of recent developments in international law, in particular in light of the right to equality, the right to property must now be understood to apply also to lands and natural resources traditionally used by indigenous communities. These institutions have affirmed that indigenous communities hold property rights over territories traditionally used also in absence of title or other forms of formal state recognition.[29] For instance,

[28] Anaya, *Indigenous Peoples in International Law*, 2nd ed. (Oxford University Press, 2004), p. 142

[29] See e.g. *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*, Judgement of 31 August 2001, Inter-Am. Ct.

in the *Sawhoyamaxa Case*, the Inter-American Court held that "*traditional possession of their lands by indigenous peoples has equivalent effect to those of state-granted full property title*" and further that "*traditional possession entitles … to … official recognition and registration of property title*".[30] The Inter-American human rights institutions have underscored that indigenous communities' property rights over territories traditionally used are not confined to the Americas. On the contrary, these institutions infer, such rights follow from globally applicable international customary law.[31]

Although to a lesser degree, regional human rights institutions outside the Americas have also reached the conclusion that indigenous communities hold property rights over territories traditionally used. In the *Endorois Case*, the African Commission on Human and Peoples' Rights echoed the conclusions drawn by the Inter-American jurisprudence, and held that indigenous communities have established property rights over territories traditionally used.[32] In Europe, the ECHR have accepted that indigenous communities' traditional use of land results in property rights.[33] An increasingly growing body of domestic jurisprudence confirms the conclusions drawn by regional human rights institutions.[34]

UN treaty body jurisprudence concurs that it follows from a correct understanding of equality that indigenous communities hold property rights over territories traditionally used. The Committee on the Elimination of Racial Discrimination (CERD Committee) has called on states to "*recognize and protect the rights of indigenous peoples to own … [and] control*" their lands and natural resources.[35] In other words, the Committee has underlined that the general right to property enshrined in CERD Convention Article 5 (d) (v) applies also to lands traditionally used by indigenous communities. The CERD Committee jurisprudence has been matched by similar conclusions by the Committee on Economic, Social and Cultural Rights (CESC). CESC has also called on states to respect the rights of indigenous peoples to own and control lands and natural resources traditionally used.[36]

H.R. (Ser. C) No. 79 (2001), paras. 149 and 151, *Mary and Carrie Dann v. United States*, Case No. 11.140, decision on December 27, 2002, paras. 130–131, *Maya indigenous communities of the Toledo District. v. Belize*, Case 12.053, decision on October 12, 2004, and *Yakey Axa Indigenous Community v. Paraguay*, IACHR judgement of 1 February 2006, Series C No. 141. On the jurisprudence that has emanated out of the Inter-American human rights institutions, see also Anaya, "Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction", in Arizona Journal of International and Comparative Law Vol. 22, No.1 (2005), p. 14, Campbell and Anaya, "The Case of the Maya Villages of Belize: Reversing the Trend of Government Neglect to Secure Indigenous Land rights", in Human Rights Law Review 8:2 (2008), p. 394, and Rodríguez-Pinero, "The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement", in Allen and Xanthaki, note 4 *supra*, pp. 462–463.

[30] *Sawhoyamaxa Indigenous Community v Paraguay*, IACHR judgement of 29 March 2006, Series C No. 125 (2005), para. 128

[31] *Supra*, notes 29 and 30

[32] *Endorois People v Kenya Case. Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Comm. 276/2003 (2010), paras. 214–215

[33] *Handölsdalen Sami Village and Others v. Sweden*, Appl. No. 39013/04, Judgement of 30 March 2010

[34] See e.g. *Te Runaga o Wharekuari Rekkohu Inc. v. Attorney-General* [1993] 2 N.Z.L.R (New Zealand), *Alexkor Ltd. & Another v. Richtersveld Cmty. & Others*, 2003 (5) SA 460 (CC) (S. Afr.) (South Africa), *Kalahari Game Reserve Case* Misca. No. 52 of 2002, of 13 December 2006 (Botswana), *Cal and Others & v. Attorney General of Belize and Minister of Natural Resources and Environment*, Claims Nos. 171 and 172 of 2007, Judgement of 18 October 2007 (Belize), the *Selbu Case*, Rt 2001 s. 769 (Norway), and the *Nordmaling Case*, NJA 2011 s. 109 (Sweden).

[35] See General Recommendation No. 23, and also e.g. A/56/18(SUPP) (Sri Lanka), para 335, CERD/C/64/CO/9 (Suriname), para. 11, CERD/C/MEX/CO 15 (Mexico), A/51/18/ (SUPP) (Botswana), paras. 304–305, Decision 1 (66), CERD/C/DEC/NZL/1.27/04/2005 (New Zealand) and Decision 1 (68), CERD/USA/DEC/1 (United States).

[36] General Comment No. 21, para. 36

Indigenous communities' property rights over lands and natural resources are also reflected in international instruments on indigenous rights. UNDRIP Article 26 proclaims that

> "[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired [and] have the right to own, use, develop and control the lands, territories and resources that they possess by reason of … traditional occupation or use…".

Furthermore, ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (ILO 169) Article 14 proclaims that indigenous peoples hold property rights over territories traditionally used. Previously, it has been stated that despite its unambiguous wording, ILO 169 does not require states to acknowledge ownership rights of indigenous communities over lands. However, against the backdrop of the outlined recent developments in international law, this assertion can presumably no longer be maintained, if it ever could.[37]

In sum, international legal sources have responded in the expected way to what follows logically from the evolved understanding of equality. Given how coherent these sources are, and given how rapidly domestic courts have picked up on this development, it appears safe to conclude that a customary international norm has emerged which provides that indigenous communities hold property rights over territories traditionally used.

It is worth adding in passing that who, more precisely, is the holder of indigenous property rights over land follows from the legal foundation that underpins the right. Since the legal foundation is traditional use, the property right holder must – by definition – be the traditional user. According to most indigenous cultures, that means indigenous communities within an indigenous people, rather than the people as such,[38] something the jurisprudence outlined above also reflects.

4.2 The relevance of the right to property to resource extraction in indigenous territories

A core element of property rights over land is the right to grant or deny access to third parties seeking to enter the land. If, as the above concludes, indigenous property rights over land established through traditional use have equal legal status with property rights held by others, that element should reasonably apply also to indigenous property rights. The opposite seems discriminatory. And again, international legal sources reflect the conclusion that follows from logic.

The CERD Committee has repeatedly underlined that indigenous communities' have the right to offer or withhold their consent to resource extraction on their traditional territories. For instance, the CERD Committee has called on Peru to "*obtain [indigenous peoples] consent before plans to extract natural resources are implemented*",[39] on Ecuador to "*obtain consent [of the indigenous people concerned] in advance of the implementation of projects for the extraction of natural resources*",[40] and, with reference to the UNDRIP, on Guatemala to "*obtain [indigenous peoples] consent before executing projects involving the extraction of natu-*

[37] Ulfstein, "Indigenous Peoples' Right to Land", in Max Planck UNYB 8 (2004), pp. 21–23, and Gilbert, *supra* note 5, p. 103

[38] Webber, "The Public-Law Dimension of Indigenous Property Rights", in *The Proposed Nordic Saami Convention; National and International Dimensions of Indigenous Property Rights*, Bankes and Koivurova eds. (Hart Publishing, 2013), pp. 85–87

[39] CERD/C/PER/CO/14-17, para. 14

[40] CERD/C/ECU/CO/19, para. 16

ral resources".[41] Patrick Thornberry, member of the CERD Committee, observes that the consent formula is now "standard", wherefore the Committee, as a general rule, requires that consent has been obtained prior to resource extraction occurs in indigenous territories. He distinguishes between situations that (i) pertain to all citizens of the country, and (ii) concern an indigenous community directly. In the former situation, Thornberry submits that indigenous peoples have mere participatory rights. But in the latter scenario, he asserts that indigenous communities' property rights award them with a right to veto industrial activities that seek access to their traditional territories.[42] In a similar vein, the CESC has held that indigenous communities are entitled to withhold consent to resource extraction in their traditional territories.[43]

The SRIP has echoed the conclusions by the UN treaty bodies outlined above. According to him, "*international legal sources of authority*", such as the UNDRIP, "*lead to the general rule that extractive activities should not take place within the territories of indigenous peoples without their … consent*".[44] The wording suggests that the SRIP addresses a wider array of rights, and not just the right to property. The fact that he subsequently proceeds to discuss expropriation criteria[45] demonstrates, however, that his primary concern is with the latter right. This further supports the conclusion that the right to property UNDRIP Article 26 enshrines embraces a right of indigenous communities to withhold or offer consent to resource extraction in their traditional territories.

Jurisprudence emanating out of the Inter-American human rights system concurs with the position taken by globally applicable legal sources. For instance, in the *Belize Case*, the Inter-American Commission held that "*one of the most central elements to the protection of indigenous peoples' property rights is the requirement that states … ensure a process of fully informed consent on the part of the indigenous community…*".[46]

In sum, the conclusions seems to be that the right to property, understood in light of the right to equality, awards an indigenous community with the right to offer or withhold consent to resource extraction projects that seek access to territories traditionally used by the community. The question is then whether there are exceptions to the general rule.

States may legitimately place certain limitations on the exercise of most human rights, including on the right to property.[47] States may limit – i.e. expropriate – property rights, provided that certain criteria are fulfilled. The limitation must serve a legitimate social aim.[48] It must be prescribed by law, i.e. be foreseeable to the property right holder.[49] Finally, the limitation must be proportionate, i.e. "*strike a fair balance between the demands of the general interest of [society as a whole] and the requirements of the protection of … fundamental rights [of the property right holder]*", without leaving her with a "*disproportionate and*

[41] See CERD/C/GTM/CO/12-13, para. 11 (a). For further similar conclusions, see e.g. CERD/C/SUR/CO/12 (Suriname), CERD/C/PHL/CO (Philippines), paras. 22 and 24, CERD/C/KHM/CO/8-13 (Cambodia), para.16, and CERD/C/SLV//CO/14-15 (El Salvador), para. 19.

[42] Thornberry, "The Convention on the Elimination of Racial Discrimination, Indigenous Peoples and Caste/Decent-based Discrimination", in Castellino and Walsh, *supra* note 12, pp. 33–34 and "Integrating the UN Declaration on the Rights of Indigenous Peoples into CERD practice", in Allen and Xanthaki, *supra* note 4, pp. 77–78

[43] E/C.12/1/add.100, para. 12 (Ecuador), and E/EC.12/Add.74, para. 12 (Columbia)

[44] *Supra* note 1, para. 27

[45] See further below.

[46] See the *Belize Case*, *supra* note 29, and Anaya, "Indigenous Peoples' Participatory Rights", *supra* note 29, p. 13.

[47] Only the most fundamental human rights, such as the rights to be free from slavery and torture, are absolute.

[48] Article 1 of the Additional Protocol 1 to the European Convention on Human Rights.

[49] ECHR's ruling in *Carbonara and Ventura v. Italy*, Appl. No. 24638/94 (30 May 2000), para. 64.

excessive burden" as a result of the limitation.[50] Of these criteria, the "prescribed by law" criterion is normally fulfilled by a state governed by the rule of law. More relevant to the present purposes are the "legitimate aim" and, in particular, the "proportionality" criteria.

With regard to the former, the SRIP "*cautions that [a legitimate social need] is not found in mere commercial interests or revenue-raising objectives, and certainly not when benefits from the extractive activities are primarily for private gain*".[51] Others may argue, however, that at least large-scale resource extraction meets a legitimate aim, e.g. because it provides society as a whole with needed resources and creates jobs. If it can be established that the industrial project serves a legitimate social need, the question becomes whether the limitation is proportionate.

In non-indigenous contexts, the proportionality criterion largely boils down to whether the property right holder receives market value compensation for damages caused by the infringement.[52] But if one assumes that indigenous communities do not primarily value their traditional territories in monetary terms, but rather because such territories are fundamentally important to their cultures, identities and ways of life, it appears unreasonably to conclude that the proportionality criterion is met simply because market value compensation is provided. Seemingly it is more relevant to consider the impact of the infringement on the indigenous community's traditional livelihoods and other culturally based land uses. The SRIP concurs with this line of argument. He infers that "[*the proportionality criterion] will generally be difficult to meet for extractive industries that are carried out within the territories of indigenous peoples without their consent*".[53] In a similar vein, according to the CERD Committee, states should "*ensure that the protection of the rights of indigenous peoples prevails over commercial and economic interests*".[54]

The positions taken by the SRIP and the CERD Committee reflect that resource extraction of scale normally has considerable negative impacts on indigenous communities' territories. Therefore, and since continued access to such lands, generally speaking, are of cardinal importance to indigenous communities' very existence, the conclusion may often be that such resource extraction places an excessive burden on the community, also measured against the interest of society as a whole. Consequently, it fails to meet the proportionality criterion.

In sum, to the extent the argument above is correct, as a general rule, it might not be possible to expropriate indigenous communities' traditional territories. Large-scale resource extraction in indigenous territories may sometimes meet the legitimate societal need criterion, although the SRIP cautions otherwise. Still, if such large-scale resource extraction considerably damages an indigenous community's territory, it assumingly fails to meet the proportionality criterion, given the fundamental importance of lands and natural resources to indigenous communities' cultures, livelihoods and ways of life. Conversely, small-scale resource extraction may cause limited harm to indigenous territories, wherefore the proportionality criterion is met. But then the legitimate societal need criterion comes into question, since small-scale resource extraction may not generate substantial benefits to society as a whole. This would lead to the conclusion that only in instances where it can be established

[50] ECHR's rulings in *Draon v. France*, Appl. No. 1513/03, para. 78, and *Evaldsson and Others v. Sweden*, Appl. No. 75252/01, para. 55

[51] *Supra* note 1, para. 35

[52] ECHR's ruling in *James and Others v. United Kingdom*, Appl. No. 8793/79, paras. 54 and 55

[53] *Supra* note 1, para. 36

[54] CERD/C/CHL/CO/15-18, paras. 22 and 23

that resource extraction in a territory traditionally used by an indigenous community does not substantially negatively impact on the community, at the same time as it genuinely brings considerable benefits to society as a whole, is expropriation an option.[55]

As the SRIP indicates, if the expropriation criteria are not fulfilled, an agreement with the relevant indigenous community might be an option to the resource extractor.

4.3 The right to self-determination

Section 3.3 describes how the beneficiaries of the right to self-determination were initially understood to be peoples in the meaning aggregate populations of states (or territories). As the below elaborates, however, from the 1990s and onwards, it has been increasingly argued that the right to self-determination applies also to peoples in the meaning groups united by common ethnicity and culture, at least in the context of indigenous peoples.

Since the late 1990s, the HRC has systematically applied the right to self-determination to indigenous peoples in country reports on states that recognize the existence of indigenous peoples within their borders. For instance, the Committee has, with reference to the indigenous peoples in Canada, emphasized that "*the right to self-determination requires … that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence*".[56] By considering indigenous peoples in the context of CCPR Article 1, the Committee takes the position that the right to self-determination applies to indigenous groups that qualify as peoples under international law. Martin Scheinin, former member of the HRC, agrees that some indigenous groups constitute peoples for the purposes of common Article 1 of the 1966 Covenants.[57] The CESC has applied CESCR Article 1 to indigenous peoples as well.[58] In sum, the UN treaty bodies mandated to authoritatively interpret the cardinal self-determination provision in international treaty law have both inferred that the right applies also to indigenous peoples.

The conclusions of the treaty bodies is reflected in UNDRIP Article 3, which proclaims that "*[i]ndigenous peoples have the right to self-determination.*" As UN General Assembly declarations in general, the UNDRIP is as such not a legally binding instrument. Still, UN Declaration provisions can nonetheless be indicative of interna-

[55] To be absolutely clear, the argument here is not that indigenous communities' property rights over land enjoy stronger protection than other property rights. The argument is simply that different elements become relevant to the evaluation of whether the proportionality criterion necessary to fulfil to lawfully expropriate land is indeed met, depending on in what ways the property right holder values the land. One could say that as other elements relevant to indigenous property rights over land, also the proportionality criterion should be culturally adjusted.

[56] See CCPR/C/79/Add.105. Similarly, the HRC has called on Australia to allow indigenous peoples a stronger role in decision-making over their traditional lands and natural resources. See A/55/40, paras. 498–528. Other instances where the Committee has addressed the right to self-determination in the context of indigenous peoples include CCPR/CO/74/SWE, CCPR/C/79/Add.109, CCPR/C/CAN/CO/5, CCPR/C/NOR/CO/5, CCPR/C/79/Add.112, CCPR/CO/82/FIN, and CCPR/CO/75/NZL.

[57] Scheinin, "Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights", in Castellino and Walsh, *supra* note 4, p. 3 and "What are Indigenous Peoples?", in *Minorities, Peoples and Self-Determination – Essays in honour of Patrick Thornberry*, Ghanea and Xanthaki eds. (Martinus Nijhoff Publishers, 2005), p. 6

[58] See e.g. UN Doc. E/C.12/1/Add.94, paras. 11 and 39. The CESC has in addition confirmed that indigenous peoples are peoples for international legal purposes in the context of right to culture. See General Comment No. 17, paras. 2, 7, 10, 12 and 32, and General Comment No. 21, paras. 7, 9, 36, 55 (e), as has the CERD Committee in the context of land and resource rights. See General Recommendation No. 23.

tional customary law.[59] If an UNDRIP provision sufficiently mirrors for instance treaty law, this suggests that the provision reflects an international customary norm.[60] As seen, UNDRIP Article 3 reflects treaty law, as it essentially clones common Article 1 of the 1966 Covenants. Since the adoption of the UNDRIP, several UN institutions have endorsed the Declaration, thereby pointing to its conformity with international law. For instance, the SRIP observes that "*[UNDRIP] represents an authoritative common understanding… of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law*".[61] The CESC and the CERD Committee also allows themselves to be guided by the UNDRIP when interpreting the CESCR and the CERD, respectively.[62] The UN Global Compact, the UN's strategic policy initiative to influence corporate behaviour, has underlined the legal relevance of the instrument by producing a guide to the UNDRIP.[63] Importantly, the adoption of the UNDRIP's self-determination provisions have accelerated the establishment of autonomy and self-government arrangements for indigenous peoples within states. Today, largely all Western countries with indigenous peoples have introduced various forms of such self-government and autonomy arrangements, as has most Latin America countries while others are moving in the same direction.[64]

In sum, today discussions as to whether indigenous peoples are entitled to the right to self-determination appear essentially to have silenced. The conclusion seems to be that indigenous peoples are indeed beneficiaries of this right.[65] The question is then what is entailed in the right to self-determination, when applied not to the aggregate population, but rather to subsegments, of states, such as indigenous peoples.

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[59] *Nuclear Test Case*. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J., Reports 1996, p. 226, Brownlie, *Principles of Public International Law* (Oxford University Press, 2003), pp. 14–15 and 663, and Shelton, "Law, Non-Law and the Problem of Soft "Law"", in *Commitment and Compliance: The Role of Non-Binding Norms in The International Legal System,* Shelton ed. (Oxford University Press, 2007), p. 1

[60] Boyle and Chinkin, *The Making of International Law* (Oxford University Press, 2007), p. 213

[61] A/HRC/9/9 (11 August 2008), para. 85

[62] E/C.12/NIC/CO/4, para. 35, CERD/C/USA/CO/6, para. 29, CERD/C/FJI/CO/17, para. 13 and CERD/C/CAN/CO/18, para. 27

[63] UN Global Compact, "UN Declaration on the Rights of Indigenous Peoples; A Business Reference Guide", December 2013

[64] Kymlicka, *Multicultural Odysseys – Navigating the New International Politics of Diversity* (Oxford University Press, 2007), pp. 80–81, 103–104, 108 and 249

[65] For concurring opinoins see e.g. Anaya, *Indigenous Peoples in International Law*, *supra* note 28, p. 150, Barelli, "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples", in International and Comparative Law Quarterly, Vol. 58 (2009), pp. 966–969, Xanthaki, "Indigenous Rights in International Law over the Last 10 Years and Future Developments", in Melbourne Journal of International Law, 10 (1) (2009), Rehman, "Between the Devil and the Deep Blue Sea: Indigenous Peoples as the Pawns in the US "War on Terror" and the Jihad of Osama Bin Laden", in Allen and Xanthaki, *supra* note 4, p. 561, Fromherz, "Indigenous Peoples Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples", in University of Pennsylvania Law Review, Vol. 156 (2008), p. 1344, Baldwin and Morel, "Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation", in Allen and Xanthaki, *supra* note 4, pp. 123–124, Koivurova, "Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospects and Prospects", in *International Journal on Minority and Group Rights, 18* (2011), p. 32, Weller, "Settling Self-Determination Conflicts: Recent Developments", in European Journal of International Law, Vol. 20, no. 1, 2009, Tomuschat, "Secession and Self-Determination", in *Secession*, Kohen ed. (Cambridge University Press, 2006) pp. 23–45, and Voyakis, "Voting in the General Assembly as Evidence of Customary International Law" in Allen and Xanthaki, *supra* note 4, pp. 222–223

4.4 The right to self-determination, specifically on the relevance for resource extraction in indigenous territories

Although the scope and content of the right to self-determination when applied to indigenous peoples is somewhat unclear, the below aims to establish certain parameters. First, indigenous peoples have to exercise the right within existing state borders. Absent extreme circumstances, the principle of territorial integrity of states precludes unilateral secession by sub-segments of states.[66] Second, as the above concludes, within states, indigenous peoples' may first and foremost exercise their right to self-determination through autonomy and self-governing arrangements. Third, for the reasons articulated below, as to the scope of these arrangements, one should distinguish between the rights to consultation and self-determination.

The right to consultation is a right to *participate* in decision-making processes. It does not ensure influence over the *material outcome* of such processes. The right vests ultimate decision-making power with an entity other than the indigenous people. It took almost 25 years to conclude the negotiations on the UNDRIP, mainly due to hesitance among states to accept that the right to self-determination applies to indigenous peoples. Indigenous peoples' right to consultation, on the other hand, has been well established in international law for decades.[67] It would appear to make little sense that states would find the right to self-determination contentious if it meant nothing more than an already existing right. Rather, the reasonable conclusion is that the scope of the right to self-determination goes beyond that of consultation.

This conclusion finds support in the Vienna Convention on the Law of Treaties (VCLT) Article 31.1, which provides that a treaty provision shall, absent convincing evidence to the contrary, be given a meaning that follows from a normal understanding of its wording.[68] A normal understanding of the phrases "*[i]ndigenous peoples have the right to self-determination*" (UNDRIP Article 3) and "*[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government…*" (UNDRIP Article 4) is that indigenous peoples are beneficiaries of a right to self-determination to be exercised through autonomy and self-government arrangements within states. No evidence supports an interpretation other than that which follows from a regular understanding of the provision's wording. Nothing in the wording of UNDRIP Articles 4 and 5 supports an interpretation that provides that the provisions merely reaffirms the existing right to consultation.

It follows from the above that the right to self-determination is something "more" than a right to *participate* in decision-making processes. That "more" must reasonably be a right to *exercise influence over the material outcome* such processes. While the right to consultation is a *process right*, the right to self-determination is primarily a *material right* that can determine the outcome of decision-making processes in favour of indigenous peoples, also in absence of agreement.[69] That said, the right must be exercised with respect for the right to self-determination that applies to peoples in the meaning aggregate populations of states. This suggests that the right to self-determination that indigenous peoples

[66] Crawford, *supra* note 17, pp. 383–418, and Cassese, supra note 17, pp. 124, 167, 283, 334 and 349

[67] Tomei and Swepston, *Indigenous and Tribal Peoples: a guide to ILO 169* (ILO, 1996), p. 8

[68] VCLT Article 31.1 must reasonably analogously apply also to UN declarations that are drafted in the style of a treaty, such as the UNDRIP. See further Åhrén, *supra* note 18, pp. 204–205.

[69] Compare EMRIP Expert Advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making, paras. 2, 20, 21and 34.

exercise through autonomy and self-governing arrangements awards them a right to materially determine the outcome of decision-making processes in some, but not all, instances.[70] At present, international legal sources do not offer much information as to what those instances are.

One may argue, however, that it makes sense to identify the instances when the position of indigenous peoples prevails over that of the majority people/state – also in cases of no agreement – by the relative importance of the matter to the respective people. If an affair is, relatively speaking, of much greater concern to an indigenous people compared with the majority people, it might be considered reasonable that the former people's right to self-determination encompasses a right to determine the outcome of the decision-making process. Resource extraction projects in their territories are assumingly essentially always of great concern to indigenous peoples. Such projects may, however, often also be of significant interest to majority peoples. Still, resource extraction tends to impact on the foundation of indigenous peoples' societies, cultures and ways of life in manners that cannot be said to apply to the majority people. This argues for that relatively speaking, resource extraction is often of far greater relevance to indigenous peoples compared with majority peoples. One may argue that this suggests that indigenous peoples' right to self-determination is far-reaching with regard to decision-making that pertains to resource extraction in their territories.[71]

4.5 The right to culture

As a final step in progressing the understanding of CCPR Article 27, the HRC has stated that an activity with "*substantive negative impacts*" on culturally based land uses must be discontinued absent free, prior and informed consent of the affected indigenous community.[72] This lowers the threshold for the applicability of the right to culture somewhat further. Now, not only resource extraction that effectively prevents, but also extraction that substantially negatively impacts on, indigenous communities' traditional livelihoods and other culturally based land uses is forbidden.

4.6 Conclusions

Although it is clear that indigenous peoples are beneficiaries of the right to self-determination, at present, international legal sources offer limited guidance as to what, more precisely, is entailed in this right when applied to sub-segments of states such as indigenous peoples. The content and scope of the right to self-determination when applied to indigenous peoples will only become clearer as states and indigenous peoples proceed to establish and progressively evolve constructive autonomy and self-government arrangements on the domestic level, and when international judicial bodies offer their view on such arrangements. At present, it is difficult to pin down how far-reaching indigenous peoples'

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[70] For concurring opinions, see Anaya, *Indigenous Peoples in International Law*, *supra* note 28, p. 150, Scheinin, "Indigenous Peoples'…", *supra* note 57, pp. 4 and 11, Xanthaki, *supra* note 65, Weller, "Towards a General Comment on Self-Determination and Autonomy", UN Document E/CN.4/Sub.2/AC.5/2005/WP.5, pp. 5–6, 12 and 16, Kymlicka, *Multicultural Odysseys*, *supra* note 64, pp. 3–5, 33 and 206–211, and Tully, *supra* note 12, p. 53.

[71] To be clear, one must distinguish between the right to self-determination outlined here, and the right to property that Sections 4.1. and 4.2 articulate. True, if the future proves the argument as to the scope and content of the former right to be correct, the exercise of the two rights may lead to similar results (acceptance or not of resource extraction in indigenous territories). Still, the legal foundation of the two rights are different, as is the legal subject. As seen, the holders of the right to property are indigenous communities within a people (or other traditional users) whereas the right to self-determination attaches to indigenous peoples as such.

[72] *Ángela Poma Poma v. Peru*, Comm. No. 1457/2006, para. 7

right to self-determination is in the context of resource extraction in their traditional territories.

The right to culture can be invoked to halt resource extraction in indigenous territories. The threshold for the right to apply is, however, high. Only resource extraction that significantly negatively impacts on an indigenous community's possibility to pursue traditional livelihoods or other culturally based land uses is outlawed.

The right to property is the most relevant of the rights examined in this article in the context of resource extraction in indigenous territories. As a general rule, the right to property entitles indigenous communities to withhold or offer their consent to resource extraction in territories traditionally used by them. The exception is when such lands can be expropriated. Existing legal sources suggest, however, that the room for lawful expropriation of indigenous territories is narrow. Alternatively, the resource extractor can seek an agreement with the relevant indigenous community, through which the extractor gain access to the community's territory.

Extractive Industries in Arctic: The International Legal Framework for the Protection of the Environment

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Abstract

The objective of this article is to provide an overview and an examination of the international legal framework for the protection of the environment from the impacts of extractive industries in the Arctic. The focus of this article is on the most significant global and regional instruments and treaties for protection and conservation of nature, its ecosystems, habitats and biological diversity that are applicable within the Arctic. One finding is that with the lack of a comprehensive global agreement dealing both with mining and oil and gas activities, as well as the lack of a comprehensive regional environmental agreement, the legal situation is fragmented with potential legal gaps and legal uncertainties. The global instruments provide significant obligations for the states to protect the marine environment and the biological diversity against the impacts from extractive industries. These are implemented with more specified regional regulations through the OSPAR Convention, which applies to parts of the marine Arctic. There is however, a need for further cooperation between the Arctic states in developing more specific regional regulations to protect the whole Arctic from extractive industries such as mining and oil and gas activities.

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1. Introduction

The Arctic marine and the terrestrial environments are under pressure from climate changes and human activities.[1] The melting of sea ice, caused by climate change, provides new possibilities for human activities in the Arctic, such as tourism, shipping and fishing. The possibilities for exploitation of natural resources through mining and oil and gas activities are also increasing.[2] This has caused a strong interest by new extractive industries in the Arctic, an area rich in hydrocarbons and minerals on land and in the sea.[3] However, mining and oil and gas activities risk damaging the environment through pollution of the air and the sea, improperly disposing of waste materials, and by destroying habitats and biological diversity. Due to this development, the vulnerable Arctic environment and its valuable ecosystems may come under threat.

The objective of this article is to provide an overview and an examination of the international legal framework for the protection of the environment from the impacts of extractive

[1] Susan Joy Hassol, *Impact of a Warming Arctic: The Arctic Climate Impacts Assessment*. (Cambridge University Press) 2004.

[2] Arctic Council, Arctic Ocean Review (AOR) (2011–2013) Final Report, p. 18. The report is available at http://www.pame.is/images/Documents/AOR_Final_Sept_2013.opna.pdf (May 2014).

[3] AOR, Final Report, p. 18. See also Nigel Banks, "Oil and gas and Mining Development in the Arctic: Legal Issues" p. 100–124, Polar Law Textbook, Natalia Loukacheva (ed.), 2010, p. 103.

industries in the Arctic.[4] It is, however, limited to the legal regulation of offshore hydrocarbon exploitation and of land-based mining activities. There are no comprehensive global treaty regulating these activities nor is there any Arctic environmental treaty.

Mining and hydrocarbon extractive activities are subject to a broad range of international environmental legal instruments. This article does not aim to assess all of these environmental instruments and treaties.[5] Moreover, the article does not analyse relevant EU law. The focus of this article is on the most significant global and regional instruments and treaties for protection and conservation of nature, its ecosystems, habitats and biological diversity that are applicable within the Arctic. The 1982 United Nations Convention on the Law of the Sea[6] (LOS Convention) includes obligations to conserve living resources as well as obligations to protect and preserve the marine environment. The Convention on Biological Diversity[7] (CBD) introduces obligations on the conservation and sustainable use of biological diversity. At the regional level, the 1992 Convention for the Protection of the Marine environment of the North East Atlantic[8] (the OSPAR Convention) contains obligations to protect the marine environment, the ecosystem and the biological diversity. These newer environmental obligations to conserve ecosystems and the biological diversity require more holistic approaches to the protection of the marine environment.[9]All human activities must be assessed together to ensure protection of sensitive and valuable ecosystems. The article analyses how these environmental obligations and environmental principles such as the precautionary principle, set limits for extractive industries in the Arctic.

2. The legal starting point – sovereign rights over natural resources

The eight Arctic states enjoy sovereignty over their land territories.[10] Most of the marine Arctic resources are located in areas subjected to the sovereign rights of the five Arctic coastal states.[11] Traditionally, neither mining nor oil and gas ac-

[4] There is no agreement regarding the areas that constitute the marine Arctic. *See* Rosemary Rayfuse, "Melting Moments: The Future of Polar Oceans Governance in a Warming World", *Review of European Community & International Environmental Law,* vol. 16:2, pp. 196–197 (2007); Alf Håkon Hoel, "Do We Need a Legal Regime for the Arctic Ocean?", *The International Journal of Marine & Coastal Law*, vol. 24 pp. 443–444 (2009) (providing examples of the many different definitions of the areas that constitute the marine Arctic).

[5] For an overview of global instruments that relate to chemicals, climate, atmosphere, oil, and gas activities that are applicable to the marine environment in the Arctic, see Arctic Council, The Arctic Ocean Review (AOR) (2009-20011), Phase I Report. Available at http://www.aor.is/images/stories/AOR_Phase_I_Report_to_Ministers_2011_2nd_edition_Nov_2013_b-1.pdf (May 2014) See also Linda Nowlan, *Arctic Legal Regime for Environmental Protection*, IUCN Environmental Policy and Law Paper 44, 2001.

[6] United Nations Convention on the Law of the Sea, 10 December 1982, entered into force 16 November 1994. 1833 UN *Treaty Series* p. 3.

[7] Convention on Biological Diversity, 5 June 1992, entered into force 29 December 1991, 1760 UN *Treaty Series*, p. 79.

[8] Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, entered into force 25 March 1998, 2354 Un *Treaty Series,* p. 67.

[9] Tore Henriksen, "Conservation and Sustainable Use of Arctic Marine Biodiversity", *Arctic Review on Law and Politics*, vol. 1:2, 2010, p. 250.

[10] The Artic Council has eight member states: the United States, Canada, Russia, Norway, Finland, Sweden, Iceland and Greenland (Denmark). Five of the Arctic states are Arctic coastal states with maritime zones within the marine Arctic: the United States, Canada, Russia, Norway and Greenland.

[11] There are four high seas areas in the marine Arctic that are beyond the national jurisdiction of these Arctic coastal states: the "Banana hole" in the Norwegian Sea, the "Loop Hole" in the Barents Sea, the "Donut Hole" in the Bering Sea, and the Central Arctic

tivities have been subject to international legal treaties. The exploitation of these resources is therefore left to the sovereign and independent control of the states.[12]

The legal starting point in international environmental law with regard to hydrocarbon extraction and mining activities is the principle of sovereignty over natural resources.[13] The sovereignty principle is qualified by the duty not to cause environmental damage. The duty not to cause transboundary environmental damage or the "no harm principle" is developed based on judicial practice.[14]

The 1972 Stockholm Declaration established in principle 21, sovereignty over natural resources as well as the responsibility not to cause damage to the environment.

Whereas, the Trail Smelter and Corfu Channel cases dealt with the responsibility not to cause damage to other states, the Stockholm Declaration expresses the added duty not to cause damage "…to areas beyond the limits of national jurisdiction." The principle was later reaffirmed in Article 2 of the Rio Declaration in 1992. In the 1996 Nuclear Weapons Advisory Opinion, the duty not to cause harm to the environment beyond national jurisdiction was confirmed as part of customary law by the International Court of Justice (ICJ).[15]

According to the principle of sovereignty over natural resources, States have the right to exploit their natural resources, such as minerals and oil and gas, without interference from other states. As for offshore oil and gas resources, the sovereign right of states to explore and exploit the natural resources on the continental shelf is set out in Article 77 of the LOS Convention. However, as shown above, this right is not absolute or unlimited, as states may not exploit their mineral resources or engage in oil and gas activities that may cause damage to the environment of other states or of areas beyond national jurisdiction.[16]

In addition, other international environmental obligations may further limit the sovereign powers of the states to exploit their natural resources.[17] This includes the obligation to protect the marine environment and to conserve marine biodiversity, to be discussed below. Question is also raised whether these obligations include activities under the jurisdiction of a state, which do not involve transboundary harm.

3. Global treaties

3.1 General

The Arctic is subject to the global legal regime for the protection of the environment. Numerous global instruments are applicable to the Arctic and require that the states take measures to protect and conserve the environment and biological diversity. During the 1960s and 1970s, various conventions dealing with pollutants or polluting activities were adopted.[18] The LOS Convention is a comprehensive treaty that includes obligations for the states to protect and preserve the marine environment. The LOS Convention has a broader

[12] Cecilia, G. Dalupan, "Mining and Sustainable Development: Insights from International Law", *International Law and Comparative Mineral Law and Policy. Trends and Prospects*, The Hague 2005, p. 149. See also George (Rock) Pring, James Otto and Koh Naito, "Trends in International Environmental Law Affecting the Minerals Industry, *Journal of Energy & Natural Resources Law*, vol. 17:1, 1999, p. 47.

[13] Dalupan (2005), p. 149.

[14] See Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law,* Oxford 2011, p. 39.

[15] See Nuclear Weapons Advisory Opinion, ICJ Reports 226 (1996), para. 29.

[16] For more about the duty to prevent environmental harm, see Birnie, Boyle and Redgwell, *International Law & the Environment,* Oxford 2009, pp. 143–152.

[17] Dalupan (2005), p. 152.

[18] Donald Rothwell, "Global environmental protection instruments and the polar marine environment" in D. Vidas (ed.), *Protecting the Polar Marine Environment. Law and Policy for Pollution Prevention*, Cambridge 2000, p. 57–59.

focus than the earlier legal instruments, as it not only deals with specific sources of pollution but with the protection and preservation of the marine environment. Hence, the LOS Convention represents a shift of perspective from the responsibility not to cause damage from pollution, to a duty for states to protect the marine environment as such.[19] In the aftermath of the LOS Convention, environmental principles have emerged in soft law instruments such as Agenda 21 and the Rio Declaration and in treaties such as the CBD and the Climate Change Convention.[20] The CBD has a broader scope than the LOS Convention does, as it takes a more holistic approach to the protection of the environment, in which the biological diversity and the ecosystems are protected and conserved, and the effects of human activities are assessed in a cumulative way.[21]

In this section, the objective is to present and assess the relevance and significance of the LOS Convention and the CBD to the protection of the Arctic environment against the threats and impacts of oil and gas activities and of the mining industry.

3.2 The LOS Convention

3.2.1 General

The LOS Convention is applicable to the Arctic Ocean and its adjacent seas. All of the Arctic states, except the United States (US), are parties to the Convention. One of the objectives of the LOS Convention is to establish "a legal order for the seas and oceans" or a constitution for the oceans.[22]

According to the LOS Convention, the coastal State may establish maritime zones within which sovereignty; sovereign rights, jurisdiction, obligations, and rights of states are allocated. The maritime areas of the Arctic are subject to different legal regimes ranging from internal waters, territorial seas to the Exclusive Economic Zones (EEZ), the continental shelf to the high seas and the Area.[23]

The LOS Convention contains obligations for the states to manage and conserve living resources and obligations to protect the environment from pollution from different human activities. The latter obligations are found in LOS Convention Part XII which includes general obligations in Articles 192 and 194, applicable to maritime zones including areas beyond national jurisdiction and which cover all sources of marine pollution.[24] They are further specified in Articles 207–212, which regulate pollution from different sources and activities, such as land-based sources, dumping at sea, seabed activities and atmospheric pollution.

3.2.2 Protection and preservation of the marine environment

Under Article 192, states have the obligation "to protect and preserve the marine environment." The obligation is broad and applies to all types of pollution of the marine environment from offshore hydrocarbon exploitation and of mining activities. Land based mining activities that pollute the marine environment, for instance, by discharges of chemicals into the sea are covered by this obligation. Moreover, the duty applies to disposing of waste into the sea. In addition, oil and gas activities that take place on the continental shelf must be carried out in compliance with the obligation to protect and preserve the marine environment.

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[19] Yoshifumi Tanaka, *The International Law of the Sea*, Cambridge 2012, p. 264.
[20] Birnie, Boyle and Redgwell (2009), p. 384.
[21] Henriksen (2010), p. 250.
[22] LOS Convention, Preamble.
[23] The Area is defined in the LOS Convention, Article 1 (1) (1) as "the seabed and the ocean floor and subsoil thereof, beyond the limits of national jurisdiction."
[24] Tanaka (2012), p. 263.

As oil and gas activities may not only cause damage from pollution, one may question whether the duty to protect the marine environment also may cover other environmental damage such as destruction of habitats. Most of the provisions in Part XII of the LOS Convention deal with marine pollution. Article 192 is however, formulated in a broad way and does not specify the activities or environmental damage to which it applies. However, since the phrase "protect and preserve the marine environment" is wide and general, this indicates that the obligation applies also to physical degradation of habitats from hydrocarbon extractive activities.

Article 194 sets out duties for the states to take measures to prevent and reduce pollution from all sources. According to Article 194(1), states shall take "…all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source…" Moreover, it follows from Article 194(2) that the states shall also take all measures that are "…necessary to ensure that activities under their jurisdiction and control are so conducted as not to cause damage by pollution to other States and their environment… and does not spread beyond areas where they exercise sovereign rights according to this Convention." Article 194 (3) specifies the need to take measures to address all sources of marine pollution such as from toxic, harmful or noxious substances from land-based pollution, atmospheric pollution and from dumping as well as pollution from installations. According to Article 194(5), states are also required to take all necessary measures to protect and preserve "rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."

As a rule, the wording of the obligations provides the states with freedom to determine themselves what measures they want to apply to comply with the obligations in Article 192 and 194. However, when read together with Article 192, the provision in Article 194(5) suggests that the states are obliged to take positive steps to protect habitats and ecosystems against the environmental impacts of, for instance, oil and gas activities by using Marine Protected Areas (MPAs).[25]

Article 207 concerns land-based pollution. It provides that states "…shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources…" Furthermore, when adopting such laws, states shall take "into account internationally agreed rules, standards and recommended practices and procedures." States shall under paragraph 20f Article 207 also "take other measures as may be necessary to prevent, reduce and control such pollution." Furthermore, states shall "…endeavour to harmonize their politics in this connection at the appropriate regional level."

Land-based pollution is only dealt with to a limited extent in global instruments, with few and general legal regulations.[26] As a response to this, some global soft law documents have been adopted, in particular under the United Nations Environment Programme (UNEP) Of importance are the "Guidelines for the Protection of the Marine Environment against Pollution from Land-Based Sources"[27] adopted by UNEP in 1985.[28] Moreover, the 1995 "Global Programme of Action for the Protection of the Marine En-

[25] See Ingvild Ulrikke Jakobsen, "Marine Protected Areas as a Tool to Ensure Environmental Protection of the Marine Arctic: Legal Aspects", in E. Tedsen et al. (Eds), *Arctic Marine Governance. Opportunities for Transatlantic Cooperation*, Berlin Heidelberg 2014, p. 225.

[26] R. R. Churchill and A.V. Lowe, The Law of the Sea, Manchester 1999, p. 379.

[27] 1985 Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-Based Sources, available at http://www.pnuma.org/gobernanza/cd/Biblioteca/Derecho%20ambiental/28%20UNEPEnv-LawGuide&PrincN07.pdf (May 2014).

[28] Tanaka (2012), p. 267.

vironment from Land-based Activities"[29] (the 1995 GPA) aims to prevent the degradation of the marine environment from land-based activities by assisting states in taking actions. The need to implement and improve the 1995 GPA is emphasized in the 2001 Montreal Declaration on the Protection of the Marine Environment from Land-Based Activities.[30]

Article 208 concerns pollution from seabed activities subject to national jurisdiction. This provision requires that states adopt laws and regulations and take other measures regarding pollution arising from seabed activities. The laws, regulations and measures that the states are obliged to take shall, in accordance with Article 208(3), be "no less effective than international rules, standards and recommended practices and procedures."

As with land-based pollution, there are few international rules or procedures related to the exploration and exploitation of oil and gas resources. Certain regulations on operational pollution in the International Convention for the Prevention of Pollution from Ships[31] (the 1973/1978 MARPOL Convention) and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other matter[32] (the London Dumping Convention) are relevant to oil and gas activities at the continental shelf.[33] Moreover, UNEP adopted in 1981 a soft law instrument, a set of Conclusions concerning the Environment related to Offshore Mining and Drilling within the Limits of National Jurisdiction.[34] The guidelines are formulated in a very general way, and are not legally binding.[35] Consequently, one may question if and how they provide guidance when states are developing laws and regulations.[36]

The LOS Convention requires states according to Article 210 (1) to adopt laws and regulations to prevent, reduce and control the pollution of the marine environment by dumping. These regulations shall as set out in Article 210 (3) ensure that dumping is not carried out without the permission of the competent authorities of states. Dumping within the territorial sea and the EEZ or the continental shelf, shall not according to Article 210 (5) be carried out without the prior approval by the coastal State. The national laws and regulations shall moreover be no less effective "in preventing, reducing and controlling such pollution than the global rules and standards" (Article 210 nr 6.) Such global rules as referred to here are provided in the London Dumping Convention and the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (the 1996 Protocol).[37] The London Dumping Convention defines dumping according to article III 1. a) as "the deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures." This means that whereas the London Convention applies to dumping from oil and gas installations, but not to disposal

[29] See http://www.gpa.unep.org/ (May 2014)
[30] See Tanaka (2012), p 267. The Declaration is available at Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (GPA), www.gpa.unep.org/ (May 2014).
[31] The International Convention on the Prevention of Marine Pollution from Ships, as modified by the Protocol of 1978 relating thereto, adopted 2 September 1973 and 17 February 1978, entered into force 2 October 1983, 1340 UN Treaty Series, p. 61.
[32] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, adopted 13 November 1972, entered into force 30 August 1975, 1046 UN *Treaty Series*, p. 138.
[33] R.R. Churchill and A.V. Lowe, *The law of the Sea*, Manchester 1999, p. 372.
[34] *Ibid.*, 371.
[35] The Conclusions were approved as Guidelines by the UN General Assembly, in Res. 37/217.
[36] For more about the Guidelines, see Robin Churchill, pp. 371–372.
[37] Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, adopted 7 November 1996, entered into force 24 March 2006. See Tanaka (2012), p. 298.

of industrial waste from land based mining activities. On the basis of the London Convention, the wastes are divided into three categories. The Convention has developed since it was adopted and become more restrictive The 1996 Protocol represents a shift from permission to prohibition of dumping at sea.[38]

Conclusively, the LOSC contains important general obligations to protect the marine environment from all sources of marine pollution. The states must therefore adopt measures to protect the marine environment against all possible marine pollution from the offshore hydrocarbon activities and land-based mining. Moreover, the coastal states are obliged to adopt laws and regulations to protect the marine environment from land – based sources, dumping, seabed activities and pollution from the atmosphere. The obligations of the LOSC are however, broad and general and do not contain specific duties with regard to the protection of the marine environment from offshore or land-based extractive industries.

3.3 The Convention on Biological Diversity

3.3.1 General

The CBD was adopted in 1992. All the Arctic states with the exception of the US are parties.[39] Article 1 states that the objective of the Convention is to ensure conservation of biological diversity, sustainable use of its components, and the fair and equitable sharing of the benefits arising from genetic resources.

3.3.2 Obligations on sustainable use and conservation of biological diversity

The concept of biological diversity is defined in Article 2. It includes diversity at the genetic level between species and the diversity of ecosystems. Biological diversity means thus the variation of life and not the sum of all life.[40]

The geographical area of application of the CBD is regulated in Article 4. According to 4(a), the CBD is applicable "in the case of components of biological diversity, in areas within the limits of national jurisdiction." Consequently, with regard to the components of biological diversity, the CBD applies to the land territory, the territorial waters, archipelago waters, the EEZ and the continental shelf of the states. With regard to "processes and activities", it follows from Article 4(b) that the CBD applies "…regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction." As a result, a state may not adopt conservation measures to protect a certain ecosystem in areas beyond its national jurisdiction, but the obligations are applicable to the flag state when for instance a vessel is fishing on the high seas.[41]

The CBD includes obligations for sustainable use and conservation of biological diversity. The precautionary principle is included in the Preamble. Although it is relevant when interpreting the obligations of the operational provisions of the Convention, it is not legally binding. The principle of sovereignty over natural resources is found in Article 3. It has a wording that is similar to the Stockholm and Rio Declarations. This signals a starting point or a legal foundation for the following obligations of the CBD.

The CBD is a framework convention with broad and general obligations that are to be further elaborated by the CBD bodies and in particular the Conference of the Parties (the COP). The obligations are also qualified by the use of such terms as "as far as possible" and "in accordance

[38] Tanaka (2012), p. 299–300.

[39] For an overview of the member states, see www.cbd.int/convention/parties/list

[40] Birne, Boyle and Redgwell (2009), p. 588.

[41] Henriksen (2010), p. 258.

with its particular conditions and capabilities". Their normative character and legally binding effect is therefore discussed debated.[42] Articles 6 to 10 contain the most significant obligations for implementing the two first-mentioned objectives of the CBD. Article 6 and Article 10 contain general measures for the conservation and sustainable use of biodiversity, such as the development of national strategies and integration into plans and programmes. Under Article 7 states are required to identify and monitor biological diversity and conditions that threaten it. They are specifically under 7 (c) to "…identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity…" This duty applies to mining and oil and gas activities.

CBD Article 8 includes different measures states are required to take in order to ensure *in situ* conservation of biological diversity. In situ conservation is defined in Article 1 as:

> "…the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties."

Several of the measures identified relate to protected areas (CBD, Article 8(a), (b), (c) and (e)). Under Article 8(a) states shall "as far as possible and as appropriate", establish a system of protected areas. A "system of protected areas" can be read as a "network", which implies that states should establish protected areas in a systematic way as part of a wider plan for conservation of biodiversity. Within such protected areas, it is reasonable to argue that all activities that may threaten biological diversity, including mining and oil and gas activities, must be regulated and restricted.

States are further required under Article 8(l), when "a significant adverse effect on biological diversity has been determined pursuant to Article 7, to regulate or manage the relevant processes and categories of activities…". Consequently, if a state determines that a mining activity has or is likely to have a "significant adverse effect" on biological diversity, the state is obliged to regulate or manage this activity.

Article 14 regulates the use of environmental impact assessment (EIA) of projects that are likely to have significant adverse effects on the biodiversity. This obligation must be seen in the context of the Articles 7 (c) and 8 (l). Article 14 relates however, to individual "proposed projects that are likely to have significant adverse effects on biodiversity", whereas the Articles 7 (c) and 8 (l) contain more general obligations on identification and mitigation of processes and activities that may cause such damage. The duty to carry out EIAs is of importance in relation to extractive industries where the environmental consequences may be severe. The duty in Article 14 applies both to assessments of projects which may cause environmental damage within national jurisdiction and to projects that have transboundary effects.[43] However, Article 14 is formulated in general and soft terms and does therefore not make it clear for which projects an EIA is required, nor how detailed assessments the states must carry out. In addition, the duty is qualified due to the terms "as far as possible and as appropriate.

The ecosystem approach is not explicitly set out in the CBD, but it follows implicitly from a

[42] Birnie, Boyle and Redgwell (2009), p. 612–616.

[43] Birnie, Boyle and Redgwell (2009), p. 621.

number of its provisions.[44] To assist the states when implementing the obligations, the Conference of the Parties (COP), the superior body under the CBD has developed principles for ecosystem approach.[45] In these principles, the ecosystem approach is described as a method or a framework for implementing the obligations on conservation and sustainable use of biological diversity.[46] The core of the ecosystem approach is however, that it focuses on the ecological interactions and where all human activities are addressed and the marine environment protected from physical degradation and pollution, which could damage the ecosystems. When the states implement their obligations on conservation and sustainable use of biological diversity and make decisions such as where, whether and how land-based mining activities or off-shore oil and gas activities should take place, the principles for ecosystem approach may provide some guidance for the states. The principles for ecosystem approach are however, broad and difficult to use in practice.

4. Regional cooperation and implementation

4.1 *General*

This section analyses how the global obligations to protect the environment and to conserve biological diversity are implemented in the Arctic at the regional level. The global obligations contained in the LOS Convention and the CBD are to be implemented at the national level. However, ecosystems are large, and the terrestrial, coastal and marine environments are interlinked with species that migrate across the jurisdictional boundaries of states. Many threats to biological diversity, such as atmospheric and water pollution, are transboundary in nature. This requires that, to ensure successful protection and conservation of the environment and the ecosystems, states cooperate with each other. LOS Convention Article 197 also requires that states shall "cooperate on global basis and, as appropriate, on a regional basis," for the protection and preservation of the marine environment."

The OSPAR Convention applies to the North East Atlantic, and includes therefore parts of the marine Arctic. Norway, Denmark, Iceland, Sweden and Finland, together with other European states and the European Community, are contracting parties to the Convention.[47] As Russia is not a contracting party, the Convention does not apply to the whole European part of the marine Arctic.

Since there is no comprehensive regional environmental agreement for the Arctic and not all of the Arctic states are parties to the global agreements (the LOS Convention and the CBD), political cooperation among the states on environmental protection is of importance. This section therefore also aims to provide an overview of the relevant work under the Arctic Council.

4.2 The OSPAR Convention

4.2.1 General

The OSPAR Convention contains obligations to protect the marine environment and marine biodiversity in the North East Atlantic. According to Article 1(a), the Convention applies to all maritime zones within and beyond national jurisdictions.[48]

[44] Hanling Wang, Ecosystem Management and Its Application to Large Marine Ecosystems: Science, Law, and Politics, *Ocean development & International Law, vol. 35,* (2004) p. 51–52.

[45] CBD COP Decision V/6.

[46] *Ibid.,* A para 1.

[47] For an overview of the contracting parties, see www.ospar.org

[48] The area of application for the Convention is described in Article 1(a).

The objective of the OSPAR Convention is to protect the marine environment within the geographical area of application against the adverse effects of human activities.[49] The Convention has a broad scope as it addresses all sources of marine pollution and other effects of human activities on the environment.[50] The Convention was also further broadened with the adoption of Annex V, which imposed the obligations to protect and conserve biological diversity and ecosystems.

4.2.2 Obligations to protect the maritime area of the OSPAR

Under Article 2 (1) (a) the states parties have a general obligation to take "…all possible steps to prevent and eliminate pollution…" and furthermore to take "the necessary measures to protect the maritime area against the adverse effects of human activities", to safeguard human health and to conserve marine ecosystems. In complying with this obligation, the contracting parties are according to Article 2 (2) a required to apply the precautionary principle. In contrast to the CBD, the precautionary principle is part of operational part of the Convention. The state parties are therefore obligated to take preventive measures when there are "reasonable grounds" for expecting "…hazards to human health, living resources and marine ecosystems…"[51]

The general obligation is developed through Articles 3–7, which are further elaborated in Annexes I–V. These obligations cover such issues and activities as dumping, pollution from land-based sources, pollution from offshore sources and assessment of the quality of the marine environment, which is important for the protection and conservation of marine ecosystems and biodiversity as provided in Annex V.

The obligations regarding land-based pollution in Article 3 and in Annex I are relevant to land-based mining activities. States are required to "take, individually and jointly, all possible steps to prevent and eliminate pollution from land-based sources…" The duty requires that states take measures to prevent pollution of the maritime area from such activities.

The OSPAR Convention includes provisions regulating dumping and pollution from offshore oil and gas activities in Articles 4 and 5 and Annexes II and III. According to Article 4, the states shall all possible steps to prevent and eliminate pollution by dumping. Annex II includes in Article 3 a ban on dumping of wastes except for listed substances such as dredged material. Annex II is not, however applicable to deliberate dumping from offshore installations.[52] Under Article 5 states have an obligation to take "all possible steps to prevent and eliminate pollution from offshore sources…" This duty is further specified and elaborated in Annex III on the prevention and elimination of pollution from offshore sources. It follows from Article 4 (1) of Annex III, that "the use on, or the discharge or emission from, offshore sources of substances which may reach and affect the maritime area shall be strictly subject to authorisation or regulation by the competent authorities." In addition, it follows that such authorization or regulation shall implement the relevant decisions and recommendation adopted by the OSPAR Commission.[53] The OSPAR Commission has adopted numerous of decisions and recommendations to minimize discharges from oil and gas activities, to reduce the risk of acute oil pollution and to manage the use of produced

[49] The OSPAR Convention, Preamble and Article 2.
[50] Louise de La Fayette, "The OSPAR Convention Comes into Force: Continuity and Progress", *The International Journal of Marine and Coastal Law*, vol. 14, (1999), p. 253.
[51] The OSPAR Convention, Article 2 (2) (a).
[52] The OSPAR Convention, Annex II Article 3
[53] The OSPAR Convention, Annex III Article 4 (1).

water etc.[54] Dumping from offshore installations is regulated in Annex III Article 3, where any "dumping of wastes or matter from offshore installations is prohibited." To provide guidance for the states, the OSPAR Commission has also adopted a strategy for offshore oil and gas industries to prevent and eliminate pollution from offshore sources.[55]

Annex V is relevant to regard to the protection of the environment against mining and oil and gas activities. The purpose of the annex is the implementation of the CBD at a regional level. Under its Article 2(a) states shall take "the necessary measures to protect and conserve the ecosystems and the biological diversity of the maritime area." This duty is formulated in a strict way and includes a duty to protect the ecosystems and biological diversity from all the human activities within the competence of the OSPAR Convention.[56] Although the OSPAR Convention does not explicitly set out an obligation for to states to adopt an ecosystem approach, such an approach is adopted by the OSPAR Commission in several documents.[57] The strategy on the Protection and Conservation of the Ecosystems and Biodiversity was adopted by the Contracting Parties in 2010 to guide the work of the OSPAR Commission in the implementation of the OSPAR Convention.[58]

Consequently, the OSPAR Convention includes obligations with regard to land-based pollution and offshore activities that are stricter and more specific than the obligations at the global level.[59] With Annex V and the obligation to protect the ecosystems and the biological diversity, the OSPAR provides a comprehensive framework for the implementation of the LOSC Part XII and the CBD in the North East Atlantic.

4.3 The Arctic Council

4.3.1 General

The Arctic Council, a high-level forum for environmental cooperation among the Arctic states, was established in 1996.[60] The Arctic Council is not an international organization, and it does not have the competence to adopt legally binding regulations. It has been described as a consensus and project driven body rather than an operational body.[61] However, in the last year, the Arctic Council has contributed to the development and adoption of legally binding instruments.[62]

According to Article 1(a) of the Ottawa Declaration, the Arctic Council was established as a high-level forum for promoting cooperation in particular on the issues sustainable development and environmental protection. The Arctic Council has made some important efforts and devel-

[54] For a list of relevant decisions and recommendations see http://www.ospar.org/v_measures/browse.asp?menu=01110305610124_000001_000000

[55] The North-East Atlantic. Environment Strategy: Strategy of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic 2010–2020, OSPAR Commission, available at http://www.ospar.org/html_documents/ospar/html/10-03e_nea_environment_strategy.pdf#OIC

[56] Fishing and shipping are excluded from the competence of OSPAR; see Preamble and Annex v, Article 4.

[57] Such as the Statement on the Ecosystem Approach to the Management of Human Activities, First Joint Ministerial Meeting of the Helsinki and OSPAR Commissions, Bremen, 25–26 (June 2003)

[58] The North-East Atlantic. Environment Strategy: Strategy of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic 2010–2020, OSPAR Commission, *available at* http://www.ospar.org/html_documents/ospar/html/10-03e_nea_environment_strategy.pdf#BDC (May 2015)

[59] See Robin Churchill, pp. 372 and 383.

[60] The 1996 Declaration on the establishment of the Arctic Council (The Ottawa Declaration), available at http://www.arctic-council.org/index.php/en/document-archive/category/5-declarations (May 2014).

[61] Timo Koivurova and Erik J. Molenaar, "International Governance and Regulation of the Marine Arctic", Report prepared for the WWF International Arctic Programme, Oslo 2009, p. 13.

[62] An example of this is the agreement on search and rescue which is negotiated under the auspices of the Arctic Council. (Arctic SAR Agreement 2011).

opments which are relevant to protecting the environment against threats from mining and oil and gas activities and which are reviewed below.

4.3.2 Background and structure of the Arctic Council

The Arctic Environmental Protection Strategy (AEPS) adopted 1991 was the basis for the foundation of the Arctic Council.[63] In AEPS, the states committed themselves to assessing and protecting the Arctic environment against pollution.[64] The states identified heavy metals and oil pollution as two of the prioritized environmental problems.[65] As part of the AEPS, the main international instruments that are relevant to the prioritized environmental problems are also identified.[66] Also, the AEPS emphasizes the need to take preventive measures consistent with the LOS Convention, regarding marine pollution.[67] The Strategy requires action regardless of the source of the pollution, whether it is land-based or marine pollution and whether the pollution stems from activities carried out by Arctic or by non-Arctic states.[68]

The work of the Arctic Council is organized under four working groups: Conservation of Arctic Flora and Fauna (CAFF), Protection of the Arctic Marine Environment (PAME), Emergency Prevention, Preparedness and Response (EPPR) and the Arctic Monitoring and Assessment Programme (AMAP).[69] The two working groups, CAFF and PAME, have provided the states with critical knowledge about the status of Arctic biological diversity and current and future threats. Important tasks for these working groups are to collect data about the status of the environment and the biological diversity and to identify, monitor and assess the risks of human activities, which information serves as the basis for advice to the Arctic states in their decision-making.[70]

Recent relevant projects carried out under CAFF and PAME are the Arctic Biodiversity Assessments[71] and the Arctic Ocean Review (AOR).[72] Through these projects, the Arctic states obtain knowledge on the status and threats to the Arctic biological diversity and knowledge about applicable legal instruments regulating activities such as mining and oil and gas. This knowledge is significant, as it may provide guidance to the states when they plan and regulate mining and oil and gas activities in the Arctic region. In the final report, the AOR suggested as one opportunity for cooperation that the Arctic states consider strengthening or creating new measures to address pollution form oil and gas activities and that they strengthen protection against land-based sources of marine pollution.[73] More concretely, one of the recommendations from the AOR is that the Arctic states strengthen the protection of marine pollution from that may arise

[63] About theko background for this strategy see Timo Koivurova and David VanderZwaag, "The Arctic Council at 10 years: Retrospect and Prospects", *University of British Columbia Law Review*, vol. 40:1, 2007, p. 121–194.
[64] Betsy Baker, "The Developing Regional Regime for the Marine Arctic", *The Law of the Sea and the Polar Regions: Interactions between Global and Regional Regimes*, Erik J. Molenaar, Alex G. Oude Elferink and Donald R. Rothwell (eds), Leiden 2013, p. 37.
[65] See AEPS, pp. 12–20.
[66] *Ibid.* pp. 20–33.
[67] Ibid. p. 33.
[68] Baker (2013), pp. 37.
[69] An overview of the working groups is available at http://www.arctic-council.org/index.php/en/about-us/working-groups (May 2014).
[70] For more about the work carried out under the working groups, see Time Koivurova & David VanderZwaag, "The Arctic Council at 10 Years: Retrospect and Prospects", *University of Colombia Law Review*, Vol. 40:1, 2007, pp. 121–194, pp. 137–153.
[71] Available at http://www.arcticbiodiversity.is/
[72] Information about the project and reports is available at http://www.aor.is/.
[73] AOR, Final report, p. 75.

from current and future activities in the Arctic, such as mining and oil and gas activities.[74]

4.3.3 Arctic Council's Arctic Offshore Oil and Gas Guidelines

Apart from the OSPAR regulations, the Arctic Offshore Oil and Gas Guidelines comprise the most important regional instrument for the regulation of oil and gas activities. The guidelines were adopted in 1997 and revised in 2009.[75] The Guidelines aim to "…to be of use to the Arctic nations for offshore oil and gas activities during planning, exploration, development, production and decommissioning."[76] Moreover, the Arctic states have different systems and different allocation of responsibility between the operator and the regulator. Therefore, it is a goal for the Guidelines "…to assist regulators in developing standards, which are applied and enforced consistently for all offshore Arctic oil and gas operators."[77] An important aspect of the Guidelines is that they are based on environmental principles, such as the precautionary approach and the sustainable development.[78] The Guidelines are organized in chapters that address different aspects and stages of the industry, such as environmental impacts assessment, environmental monitoring, safety and environmental management and operational practices. Although the guidelines are of importance as they provide Arctic- specific regulations, it must be noted that they are not legally binding.

4.3.4 Ecosystem-based management

The Arctic Council has also taken important steps to implement the ecosystem approach as referred to in the CBD and in political instruments such as Agenda 21[79] and the World Summit on Sustainable Development.[80] A core element of the ecosystem-based management is that all human activities are assessed together and coordinated so that the environmental threats and damage may be reduced. This process within the Arctic Council is therefore also significant for both mining and oil and gas activities.

First, the Best Practices in Ecosystems Based Oceans Management Project[81] was initiated by the Arctic Council and was developed as a series of case studies from seven of the eight member states during 2007–2009.[82] The project aimed to present the practice and application of the Arctic states of the ecosystem based approach to ocean management.[83] A finding was that all of the Arctic states had adopted ecosystem-based management as the goal for the ocean management. As for the implementation of the ecosystem-based management, there were, however, variations among the states.[84]

More recently, in 2011, the Arctic Council ministers called for an expert group on ecosystem-based management with a mandate to develop a common understanding of ecosystem-

[74] AOR, Final report, p. 75.

[75] Arctic Council Arctic Offshore Oil and Gas Guidelines (PAME 2009) available at http://www.pame.is/images/PAME_NEW/Oil%20and%20Gas/Arctic-Guidelines-2009-13th-Mar2009.pdf (May 2014)

[76] Arctic Offshore Oil and Gas Guidelines, section 1.2, p. 4.

[77] *Ibid.*

[78] *Ibid*. section 1.2. pp. 6–7.

[79] The United Nations Programme of Action, adopted at the Rio Conference in 1992.

[80] World Summit on Sustainable development (WSSD) Plan of Implementation, adopted in Johannesburg in 2002.

[81] Alf Håkon Hoel (ed.), Best Practices in Ecosystem-based Oceans Management in the Arctic (Norwegian Polar Institute; Report Series no. 129: April 2009; available at www.npolar.no).

[82] Alf Håkon Hoel, "Integrated Oceans Management in the Arctic: Norway and Beyond", Arctic Review on Law and Politics, vol. 1:2 (2010) p. 200.

[83] *Ibid*. p. 201.

[84] For an overview of the conclusions of the case studies, see *Ibid*. p. 201–203.

based management and ecosystem based management principles for marine and terrestrial areas, and considering developing Arctic-specific guidelines for applying the ecosystem approach to the Arctic.[85]

The outcome of the expert group, the report on the ecosystem-based management, was presented at the 2013 ministerial meeting in Kiruna. In the report, the expert group provides a definition of the concept as well as principles of ecosystem-based management in the Arctic.[86] The definition, principles and recommendations where approved at the ministerial meeting in Kiruna in 2013.[87] It will be interesting to see to what extent the agreed definition and principles will advance and promote a common approach within the Arctic to ecosystem-based management. With the increased environmental pressure due to increased economic activities including land-based mining and oil and gas development, it can be noted that the need to address the cumulative effects of human activities is included as a principle for ecosystem-based management.

5. Conclusions

With the lack of a comprehensive global agreement dealing both with mining and oil and gas activities, as well as the lack of a comprehensive regional environmental agreement, the legal situation is fragmented with potential legal gaps and legal uncertainties. Also, regulations adopted within this field are adopted in soft law instruments, which are not legally binding. Both the LOS Convention and the CBD contain relevant and significant obligations for the states to protect the marine environment and biological diversity. These general obligations are implemented with more specific obligations at the regional level through the OSPAR Convention. As this Convention applies only partly to the Arctic region, more specific regional obligations are necessary to protect the whole Arctic from extractive industries such as mining and oil and gas activities. Meanwhile, to ensure the protection of the sensitive Arctic environment, the Arctic states must cooperate with each other under the auspices of the Arctic Council.

[85] Ecosystem-based Management in the Arctic p. 3. The report is available at http://www.arctic-council.org/index.php/en/document-archive/category/449-ebm

[86] *Ibid.* p. 9–28.

[87] Arctic Council, Kiruna Declaration, 15 May 2013. http://www.arctic-council.org/index.php/en/document-archive/category/449-ebm (May 2014).

Regulating Environmental Impacts of Mining in Norway

*Ole Kristian Fauchald**

Abstract

The article examines how environmental concerns of mining can be addressed under the Minerals Act, the Planning and Building Act and the Pollution Control Act, as well as potential effects of the principles set out in the Nature Diversity Act. One objective of the article is to contribute to a discussion of distribution of power and responsibility for management of ecosystem services among central public authorities, local communities and market actors. The regulatory and administrative regime established to address environmental concerns does not seem to be up to speed with the challenges posed by the increased interest in mineral mining in Norway. The main weaknesses identified are related to the Norwegian regime's reliance on local authorities in mineral mining cases, the unclear division of competence between local authorities, mining authorities and environmental authorities, and the extent of devolution of power to public authorities without clear duties to impose and enforce environmental requirements and conditions. The article also points out the particular problems associated with marine waste deposits. Finally, it observes that despite the important environmental consequences of mineral mining, the regulatory framework does not significantly strengthen the position of stakeholders with diffuse interests or weak bargaining power.

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1. Introduction

This article focuses on environmental consequences of mining of minerals, as distinguished from stone quarries. The environmental consequences of the mining are obvious – the environmental interferences associated with accessing the minerals, industrial activities to process the minerals, the transportation infrastructure needed, and the deposit of mining waste. Norway has a long history of mining, with the Røros copper mine (listed as a World Heritage Site) and the Kongsberg silver mine as prime examples. The environmental consequences of the Røros mining activities are still very much present in the area, in particular the absence of forests due to use of wood in the mining process until the late 1880s.[1]

The starting point for this article is the Minerals Act of 2009[2] which regulates the ownership of and searching for minerals and subsequent permits to explore and mine. The objective of the Act is to 'promote and ensure socially responsible administration and use of mineral resources in accordance with the principle of sustainable development'. Given the recent adoption of the Mining Act, it is of particular interest to look clos-

[1] See www.worldheritageroros.no/ (in English). For more details, see www.verdensarvenroros.no/ressursene/1045 (in Norwegian).

[2] Lov om erverv og utvinning av mineralressurser (mineralloven), 19 June 2009 no. 101. An English translation of the Act is available at www.regjeringen.no/upload/NHD/Vedlegg/lover/mineralsact_translation_may2010.pdf.

er at how the distribution of the responsibility for environmental considerations has been divided between mining authorities, local authorities and environmental authorities. The extent to which environmental considerations are relevant when mining authorities exercise authority under the Act will be explored in section 2. Municipalities are involved through land use planning decisions, as well as environmental impact assessments (section 3). Moreover, environmental authorities are involved through pollution permits and decisions regarding waste management, as well as their duty to ensure fulfillment of environmental quality standards (section 4). The principles set out in the Nature Diversity Act, which apply to all relevant decisions of public authorities, will be explored separately (section 5). One objective of this article is to contribute to a discussion of distribution of power and responsibility for management of ecosystem services among public authorities (with a primary focus on central authorities), local communities and market actors. The focus is on the legislative distribution of decision-making power, procedural functions and rights of participation in decision-making processes among the three groups of actors (section 6).

Norway has undertaken a number of international commitments that are relevant to environmental impacts of mining activities. There has been significant discussion regarding the indigenous peoples' rights in accordance with article 27 of the International Covenant on Civil and Political Rights (1966) and articles 14 and 15 of ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (1989). The Sami population uses approximately 40 % of the area on the Norwegian mainland for reindeer herding purposes. In addition, some international commitments may be relevant to the direct environmental consequences of mining, such as the European Landscape Convention (2000) and the Bern Convention on the Conservation of European Wildlife and Natural Habitats (1979, in particular the Emerald Network). Norway has also joined several treaties and EU directives that are relevant to the treatment of mining waste, including the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), Directive 2006/21/EC on the management of waste from extractive industries, Directive 2000/60/EC establishing a framework for Community action in the field of water policy as annexed to the Agreement on the European Economic Area (1993), and the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic (1992). This article does not focus on indigenous rights or the international environmental commitments. Such commitments will only be mentioned briefly where relevant.

2. The Minerals Act and environmental considerations

One general objective of Norwegian environmental policy is to integrate environmental considerations in sector specific legislation and the decision making procedures of relevant authorities.[3] We may thus expect the Minerals Act to contain environmental provisions, and to clarify the extent to which and the procedures for how environmental considerations shall be taken into account. In accordance with the objective to ensure that mining activities respect the principle of sustainable development, section 2 of the Act states that:

> the administration and use of mineral resources pursuant to this Act shall ensure that the following interests are safeguarded:

[3] I. L. Backer, Integrasjonsprinsippet – er det noe bedre alternativ? In Backer, Fauchald and Voigt (eds) *Pro Natura. Festskrift til Hans Christian Bugge på 70-årsdagen* (Oslo, Universitetsforlaget 2012) pp. 42–62.

> … b) the nature foundation of Sami culture, commercial activity and social life; c) the surroundings and nearby areas while operations are being carried out; d) the environmental consequences of extraction; and e) long-term planning relating to subsequent use or reclamation of the area.

Accordingly, a broad range of environmental consequences are mandatory considerations when exercising public authority under the Act. A failure to take into account such consequences must be regarded as an error that could lead to the annulment of a decision to award a permit.[4]

It is made clear in the preparatory works that other provisions of the Act shall be interpreted in light of section 2.[5] One question is whether section 2 also involves obligations of result, in the sense that a permit allowing serious deterioration of the surrounding environment can be invalidated as being contrary to section 2. While the plain wording of section 2 as quoted above (the terms 'shall ensure' and 'are safeguarded')[6] could indicate such an interpretation, the labelling of the provision as a provision regarding 'considerations', the linking of the provision with section 1 on the objectives of the Act, and the way in which section 2 is described in the preparatory works[7] lead to the conclusion that it cannot be interpreted as providing minimum obligations of result.

Owners and users of the property on which search and exploration of minerals is planned have the possibility of denying activities that 'may cause damage of significance' (sections 9 and 19 of the Act). However, owners and users are also free to accept such activities, and nothing would prevent those who want to search and explore from entering into agreements whereby compensation is paid for being allowed to carry out the activities. The term 'users' is unclear. Is it limited to those who have registered legal rights of use, or can it be extended to other groups of users, such as those who use the area for recreational purposes on a regular basis? The preparatory work is not clear on this point. On the one hand, references to environmental protection indicate that a broad range of users could be relevant.[8] On the other hand, an obligation to obtain consent from a broad range of undefined users is a demanding task and is unlikely to be strictly enforced. Moreover, the discussion in the preparatory work of who should be notified of searching activities indicates a narrow approach to the 'user' concept, limiting it to those user rights that are comparable to full ownership.[9] Hence, a claim from a local association of recreational users or neighboring property owners that planned search or exploration cannot be carried out until they have consented is unlikely to succeed.

Once the explorer has concluded that minerals can be extracted on a commercial basis, the explorer may enter into an agreement with

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[4] See Lov om behandlingsmåten i forvaltningssaker 10 February 1967 (Public Administration Act, an English translation is available at www.ub.uio.no/ujur/ulovdata/lov-19670210-000-eng.pdf), sections 17, 25, 34 and 42.

[5] Ot.prp. nr. 43 (2008–2009) Om lov om erverv og utvinning av mineralressurser (mineralloven), p. 129.

[6] The official Norwegian wording: 'Innenfor rammen av § 1 skal forvaltning og bruk av mineralressursene etter denne lov ivareta hensynet til …'.

[7] Ibid. pp. 42, 100 and 129. However, the issue is not discussed in any detail in the preparatory works. The initial proposal drafted by the Ministry of Trade and Industry in 2003 did not contain any provision corresponding to section 2, see www.regjeringen.no/nb/dep/nfd/dok/horinger/horingsdokumenter/2003/horingsnotat-mineral.html?id=276488 (in Norwegian).

[8] Ot.prp. nr. 43 (2008–2009) Om lov om erverv og utvinning av mineralressurser (mineralloven), pp. 53–54. See also pp. 129 and 137 (where it is stated that reindeer herders are to be regarded as users).

[9] Ibid. p. 55. The term 'users' was used in the previous minerals legislation, and the preparatory works indicate that the concept used in the new Act should be interpreted in accordance with established practice, which favors a narrow interpretation.

the property owner if the minerals are privately owned or seek an extraction permit if the minerals belong to the state (sections 28 and 29 of the Act). If no agreement with the *property owner* is possible, the explorer may seek permit to expropriate (chapter 7 of the Act). The explorer has an enforceable right to obtain an extraction permit concerning minerals of the *state* once 'the applicant substantiates that the exploration area contains a deposit of minerals owned by the State that is of such an abundance, size and nature that the deposit may be assumed to be commercially viable, or to become commercially viable within a reasonable period of time' (section 29 of the Act). Beyond the general rules of section 2 of the Act, there is no specific *requirement* that environmental issues be taken into consideration when property owners enter into agreements with explorers or when the mining authorities decide on permits to expropriate or extraction permits. The mining authorities are *allowed* to impose conditions in order to prevent or repair environmental damages when permitting expropriation (sections 37 and 38 of the Act). Expropriation would generally be available only where the property owner is opposed to mining activities on the property, and this may be the case when the owner is concerned about environmental consequences. The preparatory work indicates that a broad range of environmental conditions can be imposed in the expropriation permit.[10] We may assume that conditions will correspond to the concerns voiced by the property owner during the negotiations with the explorer.

It is less clear whether environmental conditions may be imposed when the mining authorities issue extraction permits. The strict wording of section 29 as well as its primary focus on the distribution of permits among 'exploring parties' indicate that there should be limited possibility of imposing conditions when the explorer fulfils the requirements of the provision.[11]

Against this background, we can conclude that where the conditions for an extraction permit are fulfilled and the explorer reaches agreement with the property owner, there is limited possibility for the mining authorities to impose environmental requirements unless the explorer needs an operating license (section 43) or a plan of operations (section 42). Where the state or other public authorities are direct owners they may require explorers to fulfil environmental requirements. Where the state is indirect owner through a state-owned enterprise (e.g. through enterprises such as Norske Skog), current practice indicates that the enterprise will be free to decide whether to consent to the mining project solely on the basis of commercial considerations.[12] The extent to which environmental conditions will be part of permits to expropriate depends on whether explorers succeed in concluding agreements with property owners and users, and the attitude of the mining authorities. The preparatory work states that there have so far been few cases of expropriation and that few such cases are expected to occur in the future.[13]

According to section 43 of the Act, *operating licenses* are needed when the extraction of mineral deposits is estimated at more than 10,000 m^3 based on volume before extraction. The license may include conditions, in particular in order to promote the objectives stated in sections 1 and 2 of the Act. Such conditions would typically be

[10] Ibid. p. 142–143.

[11] Ibid. p. 65.

[12] Such practice consists of the statement of the object of the enterprise as set out in its articles of association as well as decisions of the management board of the enterprise, see lov om statsforetak 30 August 1991 no. 71 (Act relating to state-owned enterprises, an English translation is available at http://www.ub.uio.no/ujur/ulovdata/lov-19910830-071-eng.html).

[13] Ot.prp. nr. 43 (2008–2009) Om lov om erverv og utvinning av mineralressurser (mineralloven), p. 67.

relevant in order to safeguard environmental interests. As the explorer will have to demonstrate the commercial viability of the project before obtaining the extraction permit or when negotiating with private parties, when arguing with local authorities that they should accept the project through planning decisions (see section 3), and when convincing possible investors of the profitability of the project, we may assume that the explorer has significant incentives to provide high estimates of the deposit, and thus to exceed the 10,000 m^3 limit. However, the explorer may in some cases have significant incentives to provide low estimates, in particular when the project is controversial due to environmental impacts and when the project will be carried out by the explorer on the explorer's property. In such cases, the explorer could be able to start up the project without having to seek an operating license, and thus avoid burdensome environmental conditions. However, it is up to the mining authorities to decide whether they trust the estimates provided by the explorer, and to make the final decision.[14]

When the extraction is estimated at less than 10,000 m^3, but more than 500 m^3, the explorer shall notify the mining authorities (section 42 of the Act). The mining authorities may in special cases require a plan of operations, and the plan will have to be approved by the authorities before extraction can begin. This makes it possible for the authorities to ensure that environmental considerations are taken into account. The mining authorities have no obligation to require such plans.

The mining authorities have extensive powers to enforce their decisions and associated conditions. However, there is no explicit duty for the authorities to make use of their powers. Omission to take action as well as omission to impose conditions in relevant permits can possibly be brought to courts with claims that action is mandatory or that permits are invalid. As has been explained above, it would be difficult to establish legal basis for such claims under the current Act. Based on existing jurisprudence, it is likely that Norwegian courts will reject claims that public authorities have a duty to take certain measures where the legal bases for such claims are unclear.[15] But there are strong arguments that courts should play a more active part in ensuring that public authorities comply with duties to impose conditions as well as duties to act.[16]

3. Land use planning and environmental impact assessment

Mining activities cannot be carried out unless they are in accordance with existing municipal land use plans. There are two categories of such plans in Norway; the general 'municipal master plans' and the specific 'zoning plans'.[17] Such plans are adopted by elected municipal councils. While the master plans in general are drafted by politicians and bureaucrats, the zoning plans are most often drafted by private parties, including mining companies.[18] A zoning plan must be in place for all 'major building and construction projects and other projects which may have substantial effects on the environment and society' (section 12–1 of the Planning and Building Act),

[14] Ibid. p. 81.

[15] See, in particular, Rt 2003 p. 1630.

[16] See J.E.A. Skoghøy, Kravene til søksmålsgjenstand, partstilknytning og søksmålssituasjonen etter tvisteloven – noen grunnleggende spørsmål, in Lov og Rett, 2006, pp. 419–420.

[17] See chapters 11 and 12 of the Planning and Building Act of 2008 (Lov om planlegging og byggesaksbehandling, 27 June 2008 no. 71), English translation available at www.regjeringen.no/en/doc/laws/Acts/planning-building-act.html.

[18] Zoning plans may have to be drafted by public authorities where it has been decided in master plans that such planning must be done in the form of 'area zoning plans' (section 12–2 of the Planning and Building Act).

which means that private parties must prepare such plans before extraction of minerals but probably not before exploration.[19]

The municipal master plans cover all areas of the municipalities and define the activities that are permitted. A zoning plan may deviate from the master plan (section 1–5 of the Act), and thus allow mining activities in areas that are intended for other activities according to the master plan. The main function of the *master plan* in relation to mining is therefore to set aside areas for mining activities, rather than to prohibit mining activities from certain areas. The provisions concerning municipal master plans contain no special category for mining. Areas for mining are identified by the general land-use objective 'buildings and installations', and the sub-objective 'raw material extraction' (section 11–7 no. 1 of the Act). This sub-objective can be used for other raw material extractions than mineral mining. Hence, a proposal for a 'raw material extraction' area in a municipal master plan may not alert stakeholders that mineral mining is planned.

Municipalities need geological information to be able to set aside the most promising areas for mining. Compared to Sweden and Finland, Norway falls behind in terms of mapping of mineral resources. The current objective is to map 75 % of the Norwegian mainland by 2018.[20] So far, there are more than 4 000 known metal deposits in Norway, of which only three are subject to mining.[21] The potential for increased mining is consequently substantial.

In order to secure coordination of planning at the municipal level, thematic regional plans and cooperation among municipalities are encouraged.[22] However, such planning and cooperation is in an early phase in all regions. Currently, the regional level and other municipalities essentially get involved during the drafting of specific plans for mining projects, in particular during public hearings (sections 12–9 to 12–12 of the Act) and by raising objections against planned projects (sections 11–16 and 12–13 of the Act).

An environmental impact assessment (EIA) is mandatory for mining that involves extraction of more than 2 million m^3 of matter or that affects a surface area of more than 0.2 km^2.[23] This duty to carry out EIAs applies in cases of drafting of municipal master plans and zoning plans. In addition, EIAs shall be carried out based on a case-by-case assessment of impacts of the planned project, including impacts on protected areas, wilderness, vulnerable species and nature types, and recreational use, as well as pollution.[24] Some mining projects that would require operating licenses (extraction of more than 10,000 m^2) may not need to carry out EIAs.

If the municipal council wants to list an area as 'raw material extraction' in the municipal master plan, the municipality has to carry out an EIA if the thresholds listed in the Government EIA regulation are met.[25] However, as the main

[19] See Ot.prp. nr. 43 (2008–2009) Om lov om erverv og utvinning av mineralressurser (mineralloven), p. 71, which states that extraction will generally require a zoning plan, while exploration normally will not require such a plan.

[20] See Norwegian Ministry of Trade and Industry, *Strategy for the Mineral Industry* (Oslo, 2013) p. 40. Available at www.regjeringen.no/pages/38262123/strategyforthemineralindustry_2013.pdf.

[21] Ibid. p. 34.

[22] Miljøverndepartementet, Temaveileder. Uttak av mineralske forekomster og planlegging etter plan- og bygningsloven (2011) p. 5. Available at www.regjeringen.no/upload/MD/2011/vedlegg/veiledninger/mineralske_forekomster/temaveileder_mineral.pdf (Norwegian only).

[23] See Forskrift om konsekvensutredninger, FOR-2009-06-26-855, § 2 and annex I, section A.3.

[24] Ibid. §§ 3 and 4, and annex II section 10.

[25] Ibid. See also Miljøverndepartementet, Temaveileder. Uttak av mineralske forekomster og planlegging etter plan- og bygningsloven (2011) p. 7 which indicates the possibility of requesting the mining company to carry out

function of identifying areas as potential mining sites is to ensure that the areas are not irrevocably used for other purposes without serious considerations of the areas' value for mineral extraction, it may be difficult to determine whether EIAs are required (i.e. is one of the thresholds met?) and to carry out a thorough assessment based on extensive information about potential impacts. Moreover, interested parties such as environmental NGOs may not be willing to spend significant time and resources during such EIAs due to uncertainties regarding realization of the project.[26] Consequently, there is significant risk that an EIA at this stage will suffer from weaknesses in terms of effectively addressing environmental concerns. Moreover, while the authority to impose environmental requirements and conditions in municipal master plans is extensive (sections 11–8, 11–9 and 11–10), such authority may remain unused due to uncertainties regarding realization of specific projects and weaknesses of the EIA process. Municipal authorities may introduce such requirements or conditions when revising the plan at a later stage, but such revisions cannot be applied to ongoing activities, i.e. activities that have obtained required permits (sections 11–6 and 12–4 of the Act).

If an area has been set aside for raw material extraction purposes in the master plan and an EIA has been carried out, the starting point is that there is no duty to carry out a new EIA along with the *zoning plan*.[27] The decision on whether to nevertheless require an EIA in these cases has been placed with municipal authorities, which are to determine whether the project was adequately assessed in the EIA of the municipal master plan.[28] It is unclear whether a decision not to require a new EIA can be subject to administrative appeal or whether courts would accept a claim that a new EIA must be carried out. Hence, the duty to carry out an EIA along with the master plan may have as a consequence that environmental impacts of the specific project are not thoroughly assessed along with the zoning plan, and consequently that public participation remains ineffective.

The timing and quality of EIAs are essential to the requirements and conditions spelled out in the zoning plan. Zoning plans for mineral mines and the potential EIAs are generally the responsibility of mining companies.[29] There is no specific procedure to check whether the EIA and the zoning plan are of sufficient quality beyond the hearing processes and the possibility of raising objections.[30] The mining companies' main interests are presumably to maximize profits from the project and to reduce political risk as much as possible. While profitability may be increased by avoiding environmental requirements and conditions in zoning plans, such a strategy may increase political risks, as public authorities may engage in processes to impose requirements and conditions once they see the actual consequences of the mining project. While some companies may emphasize short term profitability, others

a more specific EIA as part of the process of adopting the municipal master plan.

[26] The fact that only three mines are operating despite there being more than 4 000 metal deposits is illustrative, see note 22 above.

[27] Forskrift om konsekvensutredninger, FOR-2009-06-26-855, § 2(2) and § 3(2).

[28] Miljøverndepartementet, Temaveileder. Uttak av mineralske forekomster og planlegging etter plan- og bygningsloven (2011) p. 10. There are no specific guidelines for EIA of mining. The actors generally rely on the guidelines adopted for road construction, see Statens vegvesen, Konsekvensanalyser. Veiledning, Håndbok 140 (2006).

[29] The municipality may require that the zoning plan be adopted as an 'area zoning plan' (section 12–2 of the Act). In these cases, the responsibility for drafting the plan would rest with the municipality.

[30] This could be a particularly important problem for EIAs in a small country such as Norway, with few actors (companies, consultancies and research institutions) and close contact between regulatory authorities and market actors.

may emphasize long term stability. Such decisions are likely to depend on the characteristics of the project (e.g. how long will the mining operations last), of the company (e.g. whether it is locally incorporated), and of the public authority (e.g. whether it has significant resources and legal expertise). In any case, absent a duty to carry out an EIA and the associated public scrutiny, environmental requirements and conditions are likely to be at a low level in zoning plans.[31]

EIAs and the planning decisions are closely linked to pollution permits and waste treatment issues. EIAs generally serve as bases for identifying pollution and waste issues, and options for dealing with them. They also establish bases for monitoring and decisions regarding compensatory measures.[32] The planning decisions generally include requirements and conditions that aim at preventing environmental damage from pollution and waste, for example location of the mine and associated infrastructure, the extent to which mining activities have to be carried out underground, and modes of extraction. Coordination between EIAs, municipal planning decisions and pollution permits decided by governmental authorities is therefore a challenging issue.

One recent case which may illustrate the planning process is the mining company Nussir ASA's plans to reopen and extend a copper mine in Kvalsund, a municipality in the county Finnmark with 1091 inhabitants. This is a large-scale project where mining is estimated to last for 25–30 years, and it is estimated to create approximately 150 permanent jobs and to generate annual revenue of NOK 600–700 million. The zoning plan and the EIA were combined in one document of 178 pages and presented to the municipal council, which accepted the plan on 8 May 2012.[33] The plan contains some brief provisions on environmental issues regarding existing contaminated soil, noise and dust. The Sami parliament and local reindeer herders raised objections against the plan. The mediation process resolved some of their concerns and remaining objections were transferred to the Ministry of Local Government and Modernisation, which accepted the plan as adjusted after the mediation meeting.[34] The municipality decided not to consider an objection from the Directorate for Fisheries regarding the EIA of marine waste deposits in the Repparfjord since it was submitted after the deadline.[35] This case demonstrates problems that are likely to arise when municipalities make planning decisions in mining cases. Such problems include very significant commercial and economic interests, controversies related to impacts for the local environment and existing economic and cultural activities, how to deal with complex assessments of environmental and social impacts, and the responsibility of taking into account national interests (the fjord in question had been identified as being of national interest). While municipalities

[31] Ibid. p. 10 lists a few options that may be considered by municipal authorities, including in particular requirements that the project be carried out 'step-by-step' in order to ensure environmental restoration as the project proceeds.

[32] Forskrift om konsekvensutredninger, FOR-2009-06-26-855, § 12.

[33] Relevant documents are available at: www.nussir.no/en_enviro_zoning.php (in Norwegian).

[34] The decision of the Ministry, dated 20 March 2014, is available at: www.regjeringen.no/upload/KMD/PLAN/dokumenter/Nussir_vedtak.pdf (in Norwegian).

[35] The preparatory work of the Planning and Building Act states that local authorities should take objections into account if they relate to national interests, and that the Ministry may reject a plan based on such objections, see Ot.prp. nr. 32 (2007–2008) Om lov om planlegging og byggesaksbehandling (plan- og bygningsloven) (plandelen), p. 193. Despite the fact that the objections were related to a fjord and a river that are recognized being of national interests as habitats for salmon by a decision of the Parliament (see www.miljostatus.no/Tema/Ferskvann/Laks/Nasjonale-laksevassdrag-og-laksefjorder/, in Norwegian), both the municipality and the Ministry decided to disregard the objections.

have broad discretion when adopting plans, it may not be easy to use such discretion to effectively safeguard environmental interests in major mining cases.

4. Pollution permits and waste deposits

The Pollution Control Act (1981) requires pollution permits for mining projects (sections 7 and 11 of the Act) and contains rules concerning waste (chapter 5 of the Act).[36] The Government Regulation on Pollution (Pollution Regulation) adopted under the Act contains chapters on noise and dust that determine the acceptable thresholds.[37] It contains no specific rules on pollution or waste from mineral mining.[38]

In addition to direct environmental consequences from mining activities, which involve noise and dust, mineral mining may require the establishment of processing plants to extract the minerals, in particular in cases of large mining operations. Such processing plants frequently use chemicals (e.g. flotation chemicals) and large quantities of water during processing. Such processing generally results in large quantities of mining waste, consisting of rock in various qualities, chemicals, and water. The Government Regulation on Waste (Waste Regulation) under the Act contains a separate chapter on mining waste.[39]

One question is whether treatment and deposit of mining waste should be dealt with in the form of a pollution permit or a permit to establish and operate a waste treatment facility. The approach of Norwegian environmental authorities has been to issue emission permits that cover all emissions as well as waste treatment. Such permits have until recently not taken into account the use and emission of chemicals.[40] Norway implemented the EU Directive on the management of waste from extractive industries (2006/21/EC) by adding the chapter on mining waste to the Waste Regulation on 15 June 2012.[41] Environmental authorities have decided to continue the practice of regulating waste issues through pollution permits and not issue separate decisions on waste treatment and disposal.[42] One major problem of integrating waste issues into pollution permits is the risk of failure to adequately implement the Directive's definition of 'waste facilities', not appropriately taking into account that mining companies are 'operators' of such facilities, and not implementing its provision on permits to waste facility operators (article

[36] Lov om vern mot forurensninger og om avfall (forurensningsloven) 13 March 1981 no. 6 (an English translation of the Act is available at www.regjeringen.no/en/doc/Laws/Acts/Pollution-Control-Act.html?id=171893).

[37] Forskrift om begrensning av forurensning (forurensningsforskriften), FOR-2004-06-01-931, chapters 5 and 7. Such thresholds were referred to in the zoning plan in the Nussir case.

[38] Ibid. chapter 22 regulates dumping at sea from ships, and is not applicable to dumping through pipelines, such as the one planned in the Nussir case, and chapter 30 regulates quarries and does not apply to mineral mining.

[39] Forskrift om gjenvinning og behandling av avfall (avfallsforskriften), FOR-2004-06-01-930, chapter 17.

[40] See, e.g., permits issued to Rana Gruber in 1994 (as updated in 2008 and 2010, on file with author), which contained no regulation of emission of flotation chemicals, and the amended permit issued in 2012 which contains such regulations (available at www.norskeutslipp.no/WebHandlers/PDFDocumentHandler.ashx?documentID=27739&documentType=T&companyID=27449&aar=0&epslanguage=no, in Norwegian).

[41] The directive entered into force for parties to the Agreement on the European Economic Area (1993, EEA Agreement) as of 1 August 2011, see Annex XX to the Agreement, footnote 24. The Waste Regulation does not set specific time limits for decisions of public authorities to revise existing pollution permits (section 30–17 of the Regulation). The Directive had to be implemented by EU member states before 1 May 2008.

[42] Section 17–4 of the Waste Regulation. See also the 2012 permit mentioned in note 41 above, and Klima og forurensningsdirektoratet [currently Miljødirektoratet], Veileder for søknad om tillatelse til virksomhet etter forurensningsloven. Landbasert industri, TA3006/2012, pp. 12–13.

7 of the Directive). This is likely to have implications for how mining companies organize their work with waste treatment and deposits, and for how companies and public authorities relate to issues of responsibility and liability when mining activities terminate. For example, will mining companies be allowed to cease to exist even if the waste facility remains?

Norwegian environmental authorities have broad discretion regarding the requirements and conditions that may be included in pollution permits (sections 11 and 16 of the Pollution Control Act). Moreover, the permits can be revised to take into account new or increased environmental concerns or changed circumstances (section 18 of the Act).[43] The main questions are whether the authorities are under legal obligations to impose certain requirements or conditions, and how their discretion has been used. As to legal obligations, the Pollution Regulation implements EU rules regarding noise (Directive 2002/49/EC relating to the assessment and management of environmental noise) and local air quality (Directive 96/62/EC on ambient air quality assessment and management).[44] The Regulation establishes environmental quality standards that must be met, and the pollution permits are the main means of achieving compliance. The chapter on minerals waste of the Waste Regulation does not set environmental quality standards, but it introduces other substantive, procedural and institutional requirements that environmental authorities must implement through pollution permits. Moreover, the Government Regulation on the Framework for Water Management (Water Regulation) includes environmental quality standards that are highly relevant for mineral mining.[45] The quality standards established on the basis of the Water Regulation must be implemented through requirements or conditions in pollution permits. There are thus significant obligations to impose requirements and conditions in pollution permits according to the existing legislation.

As to how the discretion has been carried out, environmental authorities refrained from regulating some important environmental impacts of mineral mining until 2008, in particular as related to marine waste deposits and emission of chemicals.[46] Recent permits regulate the emission of chemicals, but the Norwegian Environment Agency has decided that mining companies shall have significant flexibility to introduce new chemicals.[47] There are particular problems associated with permits that allow marine waste deposits, e.g. due to lack of control of where the waste is deposited, lack of knowledge regarding environmental impacts of the waste, and problems associated with monitoring and restoration. While requirements and conditions in pollution permits generally contain elaborate regulation of land-based deposits of waste, there are so far few traces of requirements or conditions based on the Water Regulation in those parts of the permits that concern marine waste facilities.

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[43] Hans Christian Bugge, Lærebok i miljøforvaltningsrett, 3. ed., Oslo: Universitetsforlaget, 2011, pp. 274–283, and Inge Lorange Backer, Innføring i naturressurs- og miljørett, 5. ed., Oslo: Gyldendal, 2012, pp. 321–333.

[44] The Pollution Regulation's chapter on air quality implements a number of more specific directives as well. However, it does not yet implement Directive 2008/50/EC on ambient air quality and cleaner air for Europe, which was entered into force for Norway on 1 November 2012, see Annex XX to the Agreement on the European Economic Area (1993), footnote 140.

[45] Forskrift om rammer for vannforvaltningen, FOR-2006-12-15-1446, which implements Directive 2000/60/EC of establishing a framework for Community action in the field of water policy, as well as more specific directives. See also article 13.4 of the Directive on the management of waste from extractive industries (2006/21/EC).

[46] See the pollution permit issued to Sydvaranger Gruve AS of 23 April 2008 (on file with author).

[47] See decision of 10 December 2010 of Klima- og forurensningsdirektoratet, Endrede krav til utslippskontroll, p. 4 (on file with author).

Mineral mining companies are vulnerable to world market prices. Experience shows that companies may have significant need to adjust production. This means that they may seek revision of the terms of pollution permits, in particular when they set strict limits regarding use of chemicals or amounts of waste. Practice has shown that applications for revisions are frequently submitted late, and that, despite the low number of mining companies, Norwegian environmental authorities have been very slow in processing such applications.[48] Hence, companies and environmental authorities may end up having a common interest in flexibility regarding revision of permits and monitoring of compliance, to the disadvantage of environmental concerns.

Against this background, the main concern regarding the Norwegian reliance on pollution permits is that they do not appropriately take into account the fact that mining companies must be regarded as operators of waste facilities and that they fail to sufficiently address environmental issues regarding marine waste facilities. The latter is closely related to EIAs. In general, there have been significant controversies related to the quality of information and assessments of marine waste issues in EIAs.[49] Moreover, marine deposits raise significant challenges regarding monitoring. As a consequence, public authorities have been relying heavily on information obtained from mining companies regarding compliance with the requirements and conditions set out in pollution permits.[50] Given the reliance on marine deposit of mining waste in Norway, it is problematic that the Waste Regulation does not address issues of particular importance to marine waste facilities. The knowledge regarding environmental impacts of processing chemicals, the flexibility of mining companies to introduce new chemicals, and the fact that waste containing heavy metals has not been specifically regulated in pollution permits remain significant concerns.

5. The Nature Diversity Act

Chapter II of the Nature Diversity Act (2009) sets out objectives and principles that apply regardless of the legislation according to which decisions are made (section 7 of the Act).[51] The principles concern knowledge regarding impacts on ecosystems and species, the precautionary principle, ecosystem approach and cumulative effects, the user-pays principle, and environmentally sound techniques and methods of operation. Hence, decisions under the Minerals Act, the Planning and Building Act, and the Pollution Control Act must make reference to relevant principles and indicate how they have been considered.[52]

In light of the competence of mining authorities to impose requirements and conditions, as well as the concerns identified above regarding local planning decisions and pollution permits,

[48] The main examples are recent revisions of permits to Rana Gruber. Relevant documents on file with author.

[49] See the account of the Nussir case above.

[50] See the monitoring reports regarding Sydvaranger Gruver and Rana Gruber, available at www.norskeutslipp.no/no/Listesider/Virksomheter-med-utslippstillatelse/?s=600&t=Mineralsk+industri,+unntatt+pukkverk (in Norwegian).

[51] Lov om forvaltning av naturens mangfold (naturmangfoldloven) 19 June 2009 no. 100 (an English translation of the Act is available at www.regjeringen.no/en/doc/laws/acts/nature-diversity-act.html?id=570549). Regarding the objectives set out in sections 4 and 5 of the Act, see Miljøverndepartemenetet, Veileder. Naturmangfoldloven kapittel II. Alminnelige bestemmelser om bærekraftig bruk – en praktisk innføring, 2012, p. 9.

[52] The second sentence of section 7 states that decisions 'shall state how these principles have been applied'. For more details, see Miljøverndepartementet, Temaveileder. Uttak av mineralske forekomster og planlegging etter plan- og bygningsloven (2011) pp. 15–16, Klima- og forurensningsdirektoratet, Veileder for søknad om tillatelse til virksomhet etter forurensningsloven. Landbasert industri, TA3006/2012, p. 3, and Miljøverndepartementet, Veileder. Naturmangfoldloven kapittel II. Alminnelige bestemmelser om bærekraftig bruk – en praktisk innføring, 2012, pp. 14–15.

we may ask whether there are certain elements of the principles set out in the Nature Diversity Act that are particularly important for decisions regarding mineral mining. As to the mining authorities, their duty to take into account environmental impacts must be considered in light of the provision concerning the knowledge base for decisions (section 8 of the Nature Diversity Act). Another issue of particular interest is the competence of mining authorities to require financial security for measures needed to clean up the site or carry out safety measures (section 51 of the Minerals Act). This competence is closely related to the 'user-pays' principle (section 11 of the Nature Diversity Act). Moreover, their decisions on which mineral resources to be surveyed and extracted are closely related to the ecosystem approach and cumulative effects (section 10 of the Act). Finally, their decisions regarding technology to be used during exploration and extraction are closely related to environmentally sound techniques and methods of operation (section 12 of the Act).

As to planning and building authorities, challenges regarding lack of knowledge and ability or willingness to check the reliability of assessments undertaken by the mining company and their consultants, indicate that local authorities are faced with significant uncertainty regarding long term impacts of planning decisions. The duty to ensure a sufficient knowledge base as regard environmental issues may therefore be of particular importance where an EIA has not provided the information needed (section 8 of the Act). Where the information remains insufficient, the precautionary principle would be relevant both for planning decisions and during EIA processes (section 9 of the Act).

As to pollution authorities, there is a significant lack of knowledge concerning coastal ecosystems, the effects of processing chemicals on marine living organisms, as well as the location and long term effects of waste deposits. The precautionary principle is consequently relevant to decisions regarding waste facilities (section 9 of the Act). Moreover, coastal ecosystems are generally subject to significant human use, and the ecosystem approach and cumulative effects must be taken into account when considering pollution permits in coastal areas (section 10 of the Act).

The above listing of relevant decisions and associated principles of the Nature Diversity Act is by no means exhaustive. It is an illustrative list of considerations that must be taken and spelled out in the relevant decisions. While national environmental and mining authorities seem to have significant focus on the principles of the Nature Diversity Act, municipalities do not yet seem to pay significant attention to the principles in their decisions.[53]

6. Concluding remarks

While mining used to be an essential economic activity in Norway, it has been of minor importance in recent decades. Increasing mineral prices, access to marine transportation, the possibility of marine waste deposits, the need to phase out Norway's reliance on petroleum extraction, and the call for economic activities in rural and Northern communities are factors that point towards increasing interest in exploiting mineral resources. Weighting the need to take into account environmental concerns against the interests in providing significant opportunities for profitable mineral mining is challenging. The Norwegian regulatory and administrative regime established to address environmental concerns does not seem to be up to speed with these challenges.

[53] See, e.g. the decision regarding a zoning plan in the Nussir case. Relevant documents are available at: www.nussir.no/en_enviro_zoning.php (in Norwegian).

One main weakness is the Norwegian regime's reliance on local authorities in mineral mining cases, since small communities have limited ability to handle complex cases with long-term impacts in a manner that take appropriately into account all relevant interests. Another weakness is the unclear division of competence between local authorities, mining authorities and environmental authorities. This may increase costs of mining companies and fragment the responsibility to ensure that environmental concerns are appropriately addressed. A third problem is the extent of devolution of power to public authorities without clear duties to impose and enforce environmental requirements and conditions. This decreases predictability for all stakeholders, increases the possibility of bargaining, and may thus increase the possibility of lowering the costs of mining companies, potentially with environmentally harmful consequences.

Particular problems are associated with marine waste deposits. Many mining projects depend on the availability of such deposits at low cost. The Norwegian regulatory regime does not yet reflect international commitments and standards. Moreover, public authorities seem willing to make decisions based on weak knowledge regarding ecosystems and long-term impact of waste deposits. They also seem to be willing to make decisions that can cause significant damage to ecosystems recognized as being of national importance.

In light of these findings, we may observe that the Norwegian legislation seems to empower local communities and environmental authorities when it comes to decision-making power and procedural functions. Moreover, there seems to be broad rights of participation in decision-making processes. However, in light of the high degree of flexibility under the legislation, the procedures for planning decisions and environmental impact assessments, and the characteristics of marine waste deposits, we may question whether such empowerment and participation are likely to be effective in the sense that they will ensure high degree of environmental protection. It seems that the current decision-making framework favors political freedom of decision-makers and promotes bargaining between public authorities and stakeholders with significant interests in the projects. Despite the important environmental consequences of mineral mining, the framework does not significantly strengthen the position of stakeholders with diffuse interests or weak bargaining power.

Extractive Industries and Indigenous Minority Peoples' Rights in Russia

*Ruslan Garipov**

Abstract

This paper analyses the existing system of protecting the interests of Russian indigenous minority peoples carrying on their traditional way of life during resource extraction on their territories. The research is supported by interviews of representatives of indigenous minority peoples carrying on their traditional way of life and the personal impressions of the author obtained during a trip to the Russian North. The author draws independent conclusions and offers recommendations to improve and develop the existing system of protecting the interests of Russian indigenous minority peoples carrying on their traditional way of life during resource extraction on their territories.

Key words: Indigenous Peoples, Indigenous Minority Peoples of the North, Siberia and Far East of Russia, Resource Extraction, Mining Companies, Environmental Protection, Territories of Traditional Natural Resource Use.

Introduction

The balance of issues between business and human rights has become increasingly important today and is the subject of international attention. For example, recently the UN Human Rights Council decided to establish a working group to address issues involving human rights, transnational corporations and other business enterprises.[1] Especially urgent are issues that concern interaction between mining companies and indigenous peoples.

Territories of indigenous minority peoples in Russia have been industrializing since the middle of the 20th Century. Different ways of living and use of natural resources caused a conflict between extractive business representatives and local indigenous communities.

According to a population census, there are approximately 400,000 indigenous minority peoples in Russia (less than 0.3 % of the total Russian population) from 46 ethnic groups. They live from Murmansk in the West to Chukotka in the East, and they occupy 60 % of all Russian territory.[2] They belong to different ethnic and linguistic groups. In the North, Siberia and the Far East, they live in extreme weather conditions. Their traditional way of life is hunting, fishing, gathering and reindeer breeding. Many are nomadic. Only 8 % of the Russian population lives in the territory of the indigenous minority peoples. However, a majority of Russian natural resources is concentrated in those same areas (97 % of gas, 80 % of oil, and 100 % of diamonds).[3]

Mining companies have entered the indig-

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[1] UN HRC Document A/HRC/RES/17/4 July 6, 2011.

[2] Official website of the Russian 2010 Census: http://www.gks.ru/free_doc/new_site/perepis2010/croc/perepis_itogi1612.htm (accessed April 2014)

[3] Nikitin M.A. "Urgent Issues of State Policy towards Indigenous Minority Peoples of the Russian North" in *Yamal Indigenous Peoples in Contemporary World: Concepts of Development. Collection of Materials* (Popkov Y.V. ed), Novosibirsk – Salehard: Published by Nonparel, 2007. p. 73.

enous minority peoples' territories to collect and remove natural resources. Their primary focus is not the interests of the indigenous minority peoples, who have been living on these resource-abundant ancestral lands for ages. The issues of peaceful coexistence between local indigenous communities and mining companies now has particular urgency because of the growing number of mining companies participating and the expanding territorial reach of such activity in Russian North. This extractive industry has caused environmental pollution in the area. The indigenous minority peoples have lost access to adequate resources to maintain their livelihood and very often have received no adequate restitution from mining companies. The principle of free, prior and informed consent before commencing industrial activity on the lands of indigenous minority peoples has been disregarded by authorities and extraction companies.[4]

Because of the industrial development of the Northern territories that began in the mid-20th century, most indigenous minority peoples are now in danger of disappearing.[5] Their territories have become polluted,[6] because of extractive industries and their traditional way of life has been threatened. Many indigenous minority peoples were forced to leave their lands and move to the cities, where they were subsequently assimilated. Of all of the problems facing indigenous minority peoples, the most concerning is the right to their lands and to their traditional way of life.

International Legal Regulation in Russia

There have been some achievements in the field of indigenous peoples' rights at the international level. The Permanent Forum on Indigenous Issues was created and has been working since 2002.[7] The Second Decade of Indigenous Peoples was declared by the United Nations from 2005 to 2014.[8] The UN Declaration on Rights of Indigenous Peoples was adopted,[9] and the Expert Mechanism on the Rights of Indigenous Peoples was established by the UN Human Rights Council and began its work in 2008.[10] The UN Forum became a place where representatives of indigenous peoples from different parts of our Planet meet and discuss their problems and exchange their experiences with each other and can ask questions to the governments and international organizations. At the end of each session, advice and recommendations are given to the ECOSOC. Russian indigenous minority peoples are also represented at the Forum and their voice could be heard at the international level.

There are two articles in the Russian Constitution that pertain directly to the indigenous minority peoples. Article 69 states: "The Russian Federation shall guarantee the rights of the indigenous minority peoples according to the universally recognized principles and norms of

[4] The principle of free, prior and informed consent is stated in the UN Declaration on the Rights of Indigenous Peoples (Articles 10, 11, 19, 28 and 29). However, Russia has not supported the document and therefore has not implemented the principle to its domestic legislation.

[5] There are some ethnic groups among Russian indigenous minority peoples which numbers less than 500 persons according to the last census (for example, Aleuts – 482, Kereks – 4, Setu – 214, Tazi – 274, Oroki – 295) http://www.gks.ru/free_doc/new_site/perepis2010/croc/Documents/Vol4/pub-04-19.pdf (accessed April 2014)

[6] *Monitoring of Development of Traditional Indigenous Land Use Areas in the Nenets Autonomous Okrug, NW Russia.* Project Report, p. 42, available at http://ipy-nenets.npolar.no/pdf%20files/MODIL-NAO%20EN%20final%202010-03-05.pdf (accessed April 2014).

[7] The official website of the Forum: http://www.un.org/esa/socdev/unpfii/ (accessed April 2014)

[8] The UN General Assembly resolution A/RES/59/174 (December 22, 2004) and the UN General Assembly resolution A/60/270/ADD.1 (August 26, 2005).

[9] The UN Declaration on the Rights of Indigenous Peoples 2007.

[10] One of the independent experts on the rights of indigenous peoples there is Mr. Alexey Tsykarev, who represents Russia. The official website of the Expert Mechanism: http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx (accessed April 2014)

international law and international treaties and agreements of the Russian Federation."[11] Article 72 states: "The joint jurisdiction of the Russian Federation and the subjects of the Russian Federation includes: protection of traditional living habitat and of traditional way of life of small ethnic communities."[12]

Although the Russian Constitution guarantees the rights of the indigenous minority peoples according to the universally recognized principles and norms of international law and international treaties and agreements, the Russian Federation refused to ratify the ILO Convention № 169 (1989) and abstained from signing the UN Declaration on Rights of Indigenous Peoples (2007). It means there are no real international guaranties to the rights of the indigenous minority peoples exist in Russia.[13]

Since Russia still has not ratified ILO Convention № 169 and has not supported the UN Declaration on Rights of Indigenous Peoples, there are no real international legal guarantees for indigenous minorities concerning mining activity on their lands. The Russian Federation has not ratified the ILO Convention № 169 mainly because of Article 14 of the Convention, which outlines the rights of ownership and possession of indigenous peoples over the lands, which they traditionally occupy.

Many arguments have been advanced in the Russian legal literature in favour of acceptance of the Convention that prove all the advantages and guaranties that indigenous minority peoples in Russia could gain if this Convention were accepted.[14] Most significantly, the Convention presents what is necessary to ensure the survival of the indigenous minority peoples. This entails preserving and developing their traditional way of life, culture, and language, guaranteeing their rights, and confirming the state's duties with regard to those rights.

Modern Russian legislation, in many respects, meets the requirements of the ILO Convention № 169. The provisions of the Convention that contradict the Russian federal legislation are marked in Russian legal literature, and the methods of overcoming these gaps are offered as well.[15] Ratification of the ILO Convention № 169 will increase the trust of the indigenous peoples in the authorities, and it will strengthen the state's control over the preservation of appropriate conditions of their lives and the law-making process in the sphere of maintaining the rights and freedoms of indigenous peoples.

Indigenous minority peoples of the Russian Federation consider Russia's participation in this Convention as a guarantee of their political rights and a strong base for the development of Russian legislation on indigenous peoples' rights. The ratification of the Convention can be an important factor that provides stability and

[11] Constitution of the Russian Federation, 1993 (Article 69).

[12] Constitution of the Russian Federation, 1993 (Article 72).

[13] Russia is a participant to the International Covenant on Civil and Political Rights, 1966. Article 27 of which says: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". This provision was implemented to domestic legislation and reflected at the Russian Federal Law About Guaranties of the Rights of Indigenous Minority Peoples of the Russian Federation, 1999. But it is not enough protection in face of extractive industries, in our opinion, and concerns only cultural rights.

[14] Kryajkov V.A. *Indigenous Minority Peoples of the North in Russian Law*. Moscow: Published by NORMA, 2010; Alexandra Xanthaki. "Indigenous Rights in the Russian Federation: The Case of Minority Peoples of the Russian North, Siberia, and Far East", *Human Rights Quarterly*, Vol. 26. 2004. p. 76.

[15] Kryajkov V.A. *Indigenous Minority Peoples of the North in Russian Law*. Moscow: Published by NORMA, 2010. p. 124–130.

a sequence of the state policy concerning these peoples. Most importantly, the basic provisions of the Convention correspond to the democratic provisions of the Russian Federation Constitution and its concrete aspects that guarantee indigenous minority peoples' rights.

Additionally, the Russian indigenous minority peoples themselves consider Russia's participation in this Convention as a guarantee of the observance of their political rights and a solid basis for the development of Russian legislation on indigenous issues. It is also necessary to adopt the UN Declaration on the Rights of Indigenous Peoples of 2007 and to initiate the development and protection of the international legal Convention on indigenous peoples' rights on the basis of the existing Declaration. It is indispensable to bring into balance the Russian legislation with international standards in the field of indigenous peoples' rights protection.

The only international document that mentions the rights of indigenous peoples that Russia has ratified is the Convention on Biological Diversity,[16] which was developed in the wake of the Rio conference. Its preamble and Articles 8(j) and 10(c) and (d) refer to indigenous peoples' rights.[17] However, the references to their rights are written in a very soft and indefinite manner, repeatedly using such language as "As far as possible and as appropriate".

In 2004 by the Conference of the Parties to the Convention on Biological Diversity were developed and adopted the Akwé: Kon[18] Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities.[19] This document was developed in collaboration with indigenous communities and was adopted to strengthen Article 8(j) of the Convention on Biological Diversity. The Conference of the Parties to the Convention on Biological Diversity requested governments to use the Guidelines and encouraged them to initiate a legal and institutional review with a view to exploring options for incorporation of the guidelines in national legislation and policies. Nevertheless, as indicated in the name of the document, the guidelines are voluntary and not legally obligatory. They have the character of recommendations.

The most effective mechanism for protecting indigenous peoples' rights and against mining activity on their territories was created by the World Bank. In its two Operational Directives 4.10 and 4.20, the World Bank discusses the necessity of protecting indigenous peoples' interests during projects financed by the World Bank.[20] Borrowers from the World Bank must divulge all information about a project before they begin and allow indigenous minority peoples the opportunity to influence the realization of the proj-

[16] Russia ratified the Convention in 1995.

[17] The Convention on Biological Diversity (Rio-de-Janeiro). June 5, 1992, available at http://www.cbd.int/doc/legal/cbd-en.pdf (accessed April 2014).

[18] Pronounced "Agway-Goo". A holistic Mohawk term meaning "Everything in Creation" provided by the Kahnawake community located near Montreal, where the guidelines were negotiated.

[19] The Document is accessible here: http://www.cbd.int/doc/publications/akwe-brochure-en.pdf (accessed April 2014).

[20] World Bank Operational Directive (OD) 4.20, a policy that aims to protect the interests of Indigenous Peoples (IP). Document Date: 2003/01/10 http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html (accessed April 2014) and World Bank Operational Directive (OD) 4.20, which calls for the preparation of an Indigenous Peoples Development Plan (IPDP) in investment projects that "affect" indigenous peoples (IP). Document Date: 2003/04/23. http://www.indianlaw.org/sites/default/files/resources/MDB%20WorldBank%20OD420.pdf (accessed April 2014)

ect. Further, item 18 of the World Bank's Operational Directive 4.10 imposes a set of obligations to projects, which concern mining activity on the lands of indigenous peoples. These obligations have been implemented by some mining companies in the Russian North, but only by those who borrow from the World Bank.[21] Thus, unfortunately, these obligations are not universal.

In October 2009, the UN Special Rapporteur on the rights of indigenous peoples, James Anaya, visited the territories of the Russian North and met representatives of indigenous minority peoples. The Special Rapporteur met with Government authorities at the federal and regional levels, representatives and members of indigenous communities, and organizations in Moscow and in the regions of Khanty-Mansiysk, Krasnoyarsk and Khabarovsk. In his final report, Mr. Anaya emphasized that many Russian mining companies currently hold consultations and sign agreements with indigenous minority peoples before extracting resources from their territories.[22] One criticism of the current practice that the Special Rapporteur heard from heads of families is that they would like to have the opportunity to discuss and negotiate all terms of their agreements with oil companies, rather than being presented with a model and an inflexible contract, pre-printed and ready to be signed.[23] At the Tenth Session of the Permanent Forum on Indigenous Issues in 2011, the RAIPON[24] first vice-president also spoke about problems encountered in implementing the Free Prior Informed Consent in Russia.[25]

Contemporary international law serves as an important guide and a strong motivation for the development of domestic legislation in the field of indigenous peoples' rights. International law has developed and continues to develop to support indigenous peoples' demands. Domestic law should follow international standards. Nowadays, indigenous peoples are full participants in international dialogue with states, international organizations and independent experts.

Federal Law in Russia

The Russian Federation is a multinational country, which includes many ethnic groups that live in Russia. The largest component of the population is ethnically Russians; the others include Tatars (the second largest group after Russians), Chechens, Udmurts, Bashkirs, Chuvashes, Yakuts, Nenets, and Chukchies. These peoples are usually divided into four groups in Russian legal literature: 1) Titular Nation (Russians); 2) Titular Nations (in Republics); 3) Indigenous Minority Peoples; and 4) National Minorities.[26]

To benefit from Federal Law about Guaranties of the Rights of Indigenous Minority Peoples of the Russian Federation, these peoples must:

- live in their historical territory;
- preserve their traditional way of life, occupations, and trades;
- recognize themselves as a separate ethnicity;
- have at most 50,000 of their population within Russia.[27]

[21] There are not many such companies in Russia, one of them, for example, Russia's leading independent natural gas producer NOVATEK in Yamal-Nenets Autonomous Okrug.

[22] Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya on situation of indigenous peoples in the Russian Federation, 2010. The UN Document A/HRC/15/37/Add.5 June 23, 2010.

[23] The UN Document A/HRC/15/37/Add.5 June 23, 2010.

[24] Russian Association of Indigenous Peoples of the North, Siberia and Far East of the Russian Federation.

[25] Report of the RAIPON first vice-president Rodion Sulyandziga at the Tenth Session of the UN PFII in 2011: http://raipon.info/1865.html (accessed April 2014)

[26] *Human Rights and Peoples' Rights*, (Mironov O.O., ed.), Moscow-Saratov: Published by Saratov Law Institute attached to the Ministry of Interior. 2006. p. 258.

[27] Russian Federal Law About Guaranties of the Rights of Indigenous Minority Peoples of the Russian Federation, 1999 (Article 1).

The Russian legislative regulations contain several omissions and contradictions concerning the rights of indigenous minority peoples in Russia. For example, the numerical criterion in the legal definition of Russian indigenous peoples does not correspond to the definition in international law.[28] The numerical criterion, in our opinion, has a discriminatory character and does not address the social purposes of the legislation on guarantees of indigenous peoples' rights. It is not advantageous for Russian indigenous minority peoples to increase their number, because they will lose all of their privileges and benefits according to Russian legislation. It was made intentionally, in our opinion, in order to keep the policy of assimilation and to integrate indigenous minority peoples into the dominant Russian population.

According to the Federal Law about Guarantees of the Rights of Indigenous Minority Peoples of the Russian Federation, these peoples have the right to protect their lands and traditional way of life. Provisions were adopted for ecological and ethnological examination before any resource extraction on the lands of indigenous minority peoples. However, these provisions still do not work, because the mechanism for such examinations has not yet been established. Therefore, these standards exist only on paper, but not in reality.

Another Federal Law "About Territories of Traditional Natural Resource Use of the Indigenous Minorities of the North, Siberia and the Far East of the Russian Federation"[29] does not resolve the problem either. Even though indigenous minority peoples have been living in the Northern territories of the Russian Federation for ages de-facto, they cannot confirm their right to the land de-jure. Consequently, this law, which has existed for more than 10 years, has had no visible effect. This law contradicts to the Federal Land Code of Russian Federation, that is why there were not created any territories of traditional natural resource use for indigenous minority peoples at the Federal level.

The Constitution of the Russian Federation (Articles 69 and 72), the Federal Law on Guarantees of the Rights of Indigenous Minority Peoples of the Russian Federation (1999), the Federal Law on General Principles of Organization of the Communities of Indigenous Minority Peoples of the North, Siberia and the Far East of the Russian Federation (2000), and the Federal Law on Territories of Traditional Natural Resource Use of the Indigenous Minority Peoples of the North, Siberia and the Far East of the Russian Federation (2001) set the basic legal system for the protection of the rights of indigenous minority peoples in the Russian Federation. Unfortunately, this system is full of legal gaps and contradictions and has to be developed according to international standards.[30]

According to the Russian Constitution and the Federal Laws, we can conclude that the rights of indigenous minority peoples to traditional natural resource use is a part of the human right to a favourable environment and an essential part of the human right to life. However, the Russian Federal Law "About Subsoil", for example, does not mention any rights of indigenous minority peoples concerning resource extraction on their territories.[31] This means by default that priority

[28] Although there is no unified definition of "indigenous peoples" in international law, there is nowhere such criterion as a number of such peoples. That is why according to Russian legislation there is no "indigenous peoples", but "indigenous minority peoples".

[29] Russian Federal Law About Territories of Traditional Nature Use of the Indigenous Minorities of the North, Siberia and the Far East of the Russian Federation, 2001.

[30] Ruslan Garipov, "Russian Indigenous Minority Peoples: Rights and Liberties Guarantees", *Journal of Russian Law*. Moscow, 2012. № 6. p. 67.

[31] Russian Federal Law about Subsoil, 1992.

is given to commercial interests and not to indigenous minority peoples who suffer at their hands.

Professor Vladimir Kryazhkov states that Russian legislation is vastly inadequate in the sphere of relations between mining companies and indigenous minority peoples. Of particular concern is the absence of the right of indigenous minority peoples to the lands they occupy. He writes about the need to develop the mechanism for interaction between mining companies and indigenous minority peoples in the Russian North. This mechanism must include, for example, carrying out ecological and ethnological expert examinations before commencement of any commercial project on the lands of indigenous minority peoples.[32] Ecological examination could show the effect of extractions to the environment and the ethnological one – to the local communities of indigenous peoples. If there is any negative affect could be visible before extractions, such commercial projects should be cancelled.

Of course, Russia made use of progressive international experiences as reflected in its domestic legal system, but is still much to do. For example, it is important to distinguish from the concept of indigenous peoples those peoples who are engaged in hunting, fishing and gathering, i.e. dependent upon the environment and in need in this regard of a special protection. It is very urgent to keep the environment in good condition and to bring the "duty to consult" into the relations between mining companies and indigenous minority peoples in Russia.[33] It is very important for indigenous minority peoples to have the opportunity to say "no" to mining companies and to veto any extractions.

It is also necessary to establish precisely by law the borders of indigenous minority peoples to preserve their environment and to guarantee the conservation of their territories for future generations, because the current legislation does not protect the territorial interests of indigenous minority peoples in Russia effectively.[34] The overview of the provisions of the Federal law on Territories of Traditional Natural Resource Use of Indigenous Minority Peoples of the North, Siberia and the Far East of the Russian Federation shows its inefficiency.

Finally, it is possible to conclude that, although legal documents existing today in Russia are directed to improving the living conditions of indigenous minority peoples, frequently their rights and freedoms are not realized because of the absence of appropriate material and financial maintenance and strong control from the state.

Regional Law in Russia

There is a good experience and legal regulation of the relations between aboriginal people, local authorities and mining companies in Khanty–Mansi Autonomous Okrug.[35] This region is rich in gas and oil. In 1992, a law was enacted about the legal status of clannish lands in Khanty–Mansi Autonomous Okrug. The clannish lands included forests, rivers, lakes, wetlands, grasslands and so on, where local indigenous minority peoples historically carried on their traditional way of life. These lands could be possessed

[32] Kryajkov V.A., *Indigenous Minority Peoples of the North in Russian Law*. Moscow: Published by NORMA, 2010. pp. 301–309.

[33] Ruslan Garipov. "Resource Extraction from Territories of Indigenous Minority Peoples in the Russian North: International Legal and Domestic Regulation" *Arctic Review on Law and Politics*, Vol. 4, 1, 2013. p. 17.

[34] Ruslan Garipov, "Resource Extraction from Territories of Indigenous Minority Peoples in the Russian North: International Legal and Domestic Regulation", *Arctic Review on Law and Politics*, Vol. 4:1, 2013. p. 17.

[35] Khanty–Mansi Autonomous Okrug, also known as "Yugra", is a federal subject in the North of Russian Federation. The local indigenous minority peoples in the region are the Khanty and the Mansi.

by individuals, families (clans) or communities. Today, all of these clannish lands have been renamed the "Territories of Traditional Natural Resource Use".

In the Surgut district of the Khanty–Mansi Autonomous Okrug, the local indigenous minority peoples make contracts with mining companies regarding the use of their lands. The special committee, within the local authorities' limits, controls the process of contracting and performance of the contracts. Therefore, indigenous minority peoples and extractive companies negotiate and cooperate with each other directly concerning mining on the territories of traditional nature management, and authorities just control the process.

Another situation is in Yamalo-Nenets Autonomous Okrug,[36] where no territories of traditional natural resource use were formed. However, the region provides a good example of relations between indigenous minority peoples and extractive industries.

The Purovsky District in the Yamalo-Nenets Autonomous Okrug is an oil and gas extraction leader. A special system of relations and cooperation between indigenous minority peoples and mining companies was formed here, in which local authorities play an important role. To support the traditional way of life, the authorities join with indigenous minority peoples to create joint-stock companies. These companies provide representatives of indigenous minority peoples with all necessary equipment in order to hunt, fish, perform reindeer herding, and the authorities manufacture and realize goods. In contrast to Khanty–Mansi Autonomous Okrug, here the authorities play an active role and participate in mining-indigenous relations.

The author found an interesting document in the Purovsky District, Yamalo-Nenets Autonomous Okrug. The document is the District Long-Time Program "Conservation of the Indigenous Minority Peoples' Traditional Way of Life and Cultural Heritage in the Purovsky District from 2012 to 2017", adopted by the Administration of the District in December 21, 2011. The document states that 4,731 representatives of indigenous minority peoples live in the Purovsky District, of whom 2,150 are nomads and keep their traditional way of life.[37]

The document also indicates that, because of industrialization and the extractive industries, the indigenous minority peoples' traditional way of life is threatened. According to this Program, the authorities intend to spend 1,645,000 Rubles[38] annually for six years for the indigenous minority peoples' needs. This amount would provide each nomad with 765 Rubles[39] annually. The Program says about organizing cultural events, competitions, publishing, and even about some health care measures, including indigenous peoples' providing with medicaments. In my opinion, it is not enough to support the traditional way of life and their cultural heritage of district's indigenous minority peoples. According, notwithstanding the far-reaching sound of the document's name, it provides no real mechanisms to bring about its goals.

Through the author's conversations with the representatives of indigenous minority peoples, it became obvious that conditions are not as good as the representatives of local authorities contend. Many problems arise during the rela-

[36] Yamalo-Nenets Autonomous Okrug is a federal subject in the North of Russian Federation. The local indigenous minority peoples in the region are the Nenets.

[37] District's Long-Time Target Program "Conservation of the Indigenous Minority Peoples' Traditional Way of Life and Cultural Heritage in the Purovsky District from 2012 to 2017", adopted by the Administration of the Purovky District, Yamalo-Nenets Autonomous Okrug, in December 21, 2011.

[38] This is approximately 47,000 USD.

[39] This is approximately 22 USD.

tions between the indigenous minority peoples and the mining companies. The main problem is the environmental degradation caused by the extractive industries and the disregard of the indigenous minority peoples' opinion during mining activities.

The results of inquiries and interviews between the author and indigenous minority peoples showed that local authorities, regardless of their duties, protect only business interests. At the same time, many among the indigenous minority peoples are dependent on their traditional way of life and suffer from the extractive industries. In addition, a high level of corruption exists at the regional level; representatives of large mining companies use the oil money to bribe the representatives of local authorities and even the representatives of local indigenous NGO leaders. Consequently, the system of relations between indigenous minority peoples and the extractive industries in Russian regions is very weak and unreliable. It is depended not on law but on the good will of local authorities and the representatives of the oil and gas businesses.

Conclusion

Although a set of legal norms is dedicated to improve the living standards among Russian indigenous minority peoples, very often it is impossible to realize them because of the lack of financial support and state and public control. The existing system of relations between indigenous minority peoples and mining companies is not sufficient, because there is no unified state policy concerning these issues and no political will to solve all of these problems in the sphere of indigenous minority peoples' rights protection.

The Russian Federation should ratify the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries № 169. This Convention allows joining it with reservations, which will simplify the process of ratification. Russia should also support the UN Declaration on Rights of Indigenous Peoples 2007, as have many other countries. It could be treated as a measure to enforce Article 69 of the Russian Constitution, and these documents could be a solid base for protecting the interests of indigenous minority peoples in carrying on their traditional way of life during resource extraction on their territories.

It is very important to bring to the fore the internationally recognized principle of free, prior and informed consent of indigenous minority peoples concerning any proposed commercial development on their territories. Indigenous minority peoples in the Russian Northern territories should be recognized as equal partners by commercial enterprises and must be allowed the opportunity to co-manage all such projects.

It is indispensable to protect the environment and lands of indigenous minority peoples as well as their traditional way of life and traditional natural resource use. The unified system of relations between indigenous minority peoples and mining companies should be developed.

The Federal Law about Subsoil needs some changes, including, most importantly, adding the principle of free, prior and informed consent of indigenous minority peoples before any extractive activity is commenced. Federal laws should also be developed and adopted regarding ecological and ethnological examination before resource extraction can occur on the lands of indigenous minority peoples.

Narratives in Conflict: Alaska Natives and Offshore Drilling in the Arctic

*Michael Burger**

Abstract

This Symposium Essay examines and elucidates the ways in which the narrative constructions that constitute the "imaginary Arctic" factor into litigation surrounding Shell Oil's highly controversial attempts to drill for oil and gas in the Beaufort and Chukchi seas off Alaska's North Slope. Judges, lawyers and litigants involved in the Shell litigation have deployed a number of well-established storylines against each other: the Arctic as Classical Frontier, the Arctic as Spiritualized Frontier, the Arctic as Ancestral Homeland, the Arctic as Developing World, and the Arctic as Neutral Space. The litigation literature produced by this "battle for the Arctic" offers an opportunity to observe how conflicting narratives about nature figure into the rhetorical strategies of lawyers and judges – and thus how they factor into the law. In addition, the role of Inupiat narratives in the litigation and underlying administrative proceedings illustrates that -- accepting the bargain struck in the 1971 Alaska Native Claims Settlement Act as a given -- the layered United States system of administrative permitting and judicial review does not violate indigenous peoples' rights under relevant provisions of international law.

I. Introduction

This Essay provides a close reading and interpretation of the legal pleadings, briefs and memoranda, and judicial opinions involved in the litigation surrounding Royal Dutch Shell's attempt to drill for oil in the Beaufort and Chukchi seas, off Alaska's northern coastline. Shell's program in the region has provoked a series of lawsuits by representatives of and individuals from the indigenous Inupiat population of the North Slope, as well as from state and national environmental organizations. The litigation literature produced by this "battle for the Arctic" offers an opportunity to observe how conflicting narratives about nature (or Nature) factor into the rhetorical strategies of lawyers and judges – and thus how they factor into the law. Here, entrenched and competing storylines that seek to define the Arctic – visions of homeland and frontier told by indigenous peoples, environmental advocates, extractive industry representatives, and state boosters – connect the law to familiar expressions of the environmental imagination, and thereby situate the law within a broader environmental discourse. Indeed, in their written submissions to the courts litigants and their lawyers construct alternative visions of "the Arctic" which infuse the place, its inhabitants and its resources with different kinds and degrees of significance. These significations, however, even though sometimes acknowledged or even internalized by the courts, are in turn, and ultimately, made indifferent by their subjugation to the dominant narrative contained in the technocratic, managerial regime of domestic administrative law.

This process of narrative presentation and neutralization raises interesting questions about

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the content and purposes of environmental and natural resources law in the United States.[1] For instance, is this process evidence of the law's appropriate functioning as an instrument for the mediation of disputes over resource management and pollution? Is it evidence of the law's imposition of an independent set of values that stand in conflict with those subject to the law? Is it an example of "law's empire"?[2] Moreover, both the process and the questions it raises are worth considering in the comparative, trans-Arctic context of this Symposium, as the substance and form of the conflicting narratives likely differ from one country or region to the next, as might their treatment in other domestic and international tribunals. In this Essay, I do not attempt to directly answer those big questions, nor do I undertake a comparative analysis of Arctic tropes (though it is certainly my hope that the Essay will take on added dimension by virtue of the company it keeps). Rather, the Essay has three far more limited tasks. First, Parts II-IV situate the story of Shell and the Alaskan Arctic—of "the Eskimo and the oil man," as one journalist has it[3]—within the broader contexts of United States law. Second, Part V proves out the process of narrative presentation and neutralization through textual examination. Third, Part VI argues that though the role of story, narrative and rhetoric indicates the need to further examine the relationship between law and culture, the way in which Inupiat narratives have been heard in and actually impacted the direction of drilling in the Arctic illustrates that the layered United States system of administrative permitting and judicial review does not violate indigenous peoples' rights under international law. Part VII briefly concludes.

II. Oil and Gas Resources in Alaska's Arctic waters

There are significant oil and gas resources in the offshore areas of the Alaskan Arctic. The United States Geological Survey estimates that the Beaufort Sea and Chukchi Sea areas contain approximately 30 billion barrels (bb) of crude oil, and 221 trillion cubic feet (tcf) of natural gas.[4] This accounts for approximately 33 percent of all undiscovered Arctic oil, and approximately 7.5 percent of the global region's as-yet untapped natural gas supply. Given the Alaskan Arctic's access to the Trans-Alaska Pipeline System, which runs from Prudhoe Bay on the North Slope to Valdez on the state's southern coast, and the favorable political climate for oil development in Alaska, industry's long-running interest in offshore oil exploration in the Beaufort and Chukchi seas makes perfect business sense.[5] However, natural gas, once extracted, currently has no way to reach market; thus, development of the natural gas fields would require construction of a liquefied natural gas terminal or pipeline, making it somewhat less enticing.[6]

A number of existing offshore oil production sites in shallow areas of the Beaufort Sea already exist.[7] In addition, approximately 30 exploratory wells have been drilled in offshore areas in the

[1] *See* Michael Burger, *Environmental Law/Environmental Literature*, 40 Ecology L. Q. 1 (2013).

[2] *See* Ronald Dworkin, Law's Empire (1998) (arguing that law is best understood to provide political community with means to act in a coherent and principled manner in respect to those subject to the law).

[3] Bob Reiss, The Eskimo and the Oil Man: The Battle at the Top of the World for America's Future (2012).

[4] U.S. Geological Survey, Circum-Arctic Resource Appraisal: Estimates Of Undiscovered Oil And Gas North Of The Arctic Circle at 4 (2008), *available at* http://pubs.usgs.gov/fs/2008/3049/ (last visited April 4, 2014).

[5] *See generally*, Ernst & Young, Arctic Oil And Gas (2012).

[6] U.S. Energy Information Administration, Alaska, State Profile and Energy Estimates, Profile Analysis, http://www.eia.gov/state/analysis.cfm?sid=AK (last visited April 4, 2014).

[7] Nuka Research And Planning Group, U.S. Arctic Program, PEW Environment Group, Oil Spill Preven-

Beaufort and Chukchi seas, none of which has been found to be economical to develop.[8] The litigation that is the subject of this study, though, involves Shell's decade-long program to drill new exploratory wells in recently leased areas on the Alaskan Outer Continental Shelf, an area of special importance to the traditional subsistence cultures of the North Slope's indigenous Inupiat peoples.

III. The Governance and Legal Rights of Alaska Natives

The indigenous people of Alaska are often referred to collectively as Alaska Natives, and are subdivided into 227 recognized tribes split among five major groupings: Inupiat (Aleuts, Northern Eskimos), Yupik (Southern Eskimos), Athabascans (Interior Indians), Tlingit and Haida (Southeast Coastal Indians). Climate change impacts in the Arctic, and the rush toward natural resources exploration and extraction there, primarily impact the Inupiat. There are, of course, numerous climate change impacts in these areas of the Arctic, including changes in ocean pH levels, thawing of permafrost, melting sea ice, coastal erosion, decreased water quality, and increasingly variable and unpredictable weather, all of which produce direct and indirect impacts on subsistence culture, and collectively present a fundamentally existential threat.[9]

The Alaska Native Claims Settlement Act (ANCSA), which the U.S. Congress passed in 1971, following the discovery a few years earlier of oil on Alaska's North Slope, is central to an understanding of this story.[10] ANCSA resolved the vast majority of Alaska Native land claims and extinguished aboriginal title, including inland and offshore hunting and fishing rights.[11] The U.S. Court of Appeals for the Ninth Circuit has extended the effect of ANCSA to sea ice many miles offshore.[12] That court has also held that the federal paramountcy doctrine bars Alaska Native claims to the Outer Continental Shelf.[13] Notably, ANCSA did not address the issue of Alaska Natives' sovereignty or the status of the tribal governments.[14] Native Alaska tribes are now treated on the "same footing" as tribes in the lower 48 states,[15] though their lands are not considered part of "Indian country" for purposes of federal Indian law.[16]

As part of the deal, ANCSA divided Alaska into 12 geographic regions, and assigned a "Regional Corporation" for each region.[17] The regional corporations were authorized to select lands that would become their private property. Each of the 12 geographic regions also contains numerous smaller "Village Corporations,"

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tion And Response In The U.S. Arctic Ocean, Unexamined Risks, Unacceptable Consequences 28 (Nov. 2010).

[8] *Review of Shell's 2012 Alaska Offshore Oil and Gas Exploration Program*, Rep. to the Sec'y of the Interior (March 8, 2013), *available at* www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf.

[9] For a useful summary of climate change impacts and their influence on subsistence culture, *see* Elizabeth Barrett Ristroph, *Alaska Tribes' Melting Subsistence Rights*, 1 Ariz. J. Envtl. L. & Pol'y 47, 51–66 (2010); *see also* Hinzman, et al., *Evidence and Implications of Recent Climate Change in Northern Alaska and Other Arctic Regions*, 72 Climate Change 251 (2005) (providing a scientific background).

[10] 43 U.S.C. §§ 1601–1629(a) (2006) (Alaska Native Claims Settlement Act).

[11] 43 U.S.C. § 1603(b).

[12] Iñupiat Community of the Arctic Slope v. United States, 746 F.2d 570, 571 (9th Cir. 1984).

[13] Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998).

[14] *See generally*, Thomas R. Berger, *Village Journey: The Report of the Alaska Native Review Commission* 151, 164 (1985, Inuit Circumpolar Conference) 4th Printing published in 1995 with a new preface (Douglas & McIntyre, Hill & Wang) (discussing Native Alaska views of tribal government).

[15] Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364 (Oct. 21, 1993)

[16] Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998).

[17] *See generally*, 43 U.S.C. §§ 1611, 1613, 1618 (2010).

which amount to about 225 altogether. The village corporations were authorized to select surface lands in and around their villages (while the regional corporations held subsurface rights to village lands). Importantly, ANCSA required every regional and village corporation to be organized under Alaska law. Accordingly, the Alaska Native Corporations were organized as private corporations, not as tribal governments; moreover, while regional corporations were required to choose for-profit entity status, all of the village corporations have opted to do so.[18] In addition, a thirteenth regional corporation was subsequently formed for non-resident Alaska Natives. The regional and village corporations exist independently of the native villages and other organizations that govern Alaska Natives, a fact which sometimes puts the interests of the corporations and the tribal governments at odds.[19]

Opinion of ANCSA is mixed. Many people, including Alaska Natives, characterize the ANCSA settlement as a "win." Proponents of the settlement can point to the fact that today the Alaska Native Corporations are a powerful economic force in Alaska, and around the world. Taken together, they are the largest private landowners in the state, with title to approximately 44 million acres of selected land among them, with billions of dollars in annual revenue.[20] However, others disparage the settlement as a "partial settlement" that gave up too much for far too little.[21] The acreage now owned by the corporations represents approximately 11 percent of the lands to which Alaska Natives could have claimed aboriginal title. In exchange, Alaska Natives were given $462.5 million in federal appropriations over an 11-year period, and $500 million in oil and gas revenues, a fraction of the real value of the lands and their natural resources. In addition, some argue that the statute itself was a violation of the Alaska Natives' rights under various provisions of international law, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[22]

Whatever one's assessment of its merits, however, ANCSA unquestionably provides the legal background for Alaska Native rights and sets the stage for the unfolding drama in offshore areas in the Beaufort and Chukchi seas. Importantly, the Arctic Slope Regional Corporation (ASRC), which is based in Barrow and has offices in Anchorage and elsewhere, has title to nearly five million acres of land in northern Alaska. The ASRC has long been involved in the oil and gas support services sector, and has had direct involvement in Shell's efforts to obtain permits and conduct seismic testing in offshore areas.[23] The ASRC is also involved in the extraction of bituminous coal, and in engineering, venture capital and financial management, consulting, civil con-

[18] For a discussion of the relationship between corporate organization and traditional Alaska Native culture, *see* James Allaway & Byron Mallott, *ANCSA Unrealized: Our Lives Are Not Measured in Dollars*, 25 J. Land Resources & Envtl. L. 139, 140-42 (2005). *See also* Gavin Kentch, *A Corporate Culture? The Environmental Justice Challenges of the Alaska Native Claims Settlement Act*, 81 Miss. L.J. 813 (2012) (examining the environmental justice implications).

[19] *See* Kentch, *supra* note 19, at 827–37.

[20] U.S. Gov't Accountability Office, GA0 13-121, Regional Alaska Native Corporations: Status 40 Years After Establishment and Future Considerations 39 (2012).

[21] Assessments are manifold. Some useful starting points include Charles Edwardsen, Jr., "The New Harpoon," in H.G. Gallagher, Etok: A Story of Eskimo Power 26, 61 (G.P. Putnam's sons, N.Y. 1974); Frederick Seagayuk Bigjim & James Ito-Adler, Letters to Howard: An Interpretation of the Alaska Native Land Claims (Anchorage, Alaska Methodist University Press, 1975); Mary Clay Berry, The Alaska Pipeline: The Politics of Oil and Native Land Claims (Alaska Native Federation, Anchorage 1976).

[22] *See* David Case and Dalee Sambo Dorough, *Tribes and Self-Determination in Alaska*, 33 SPG-Hum. Rts. 13 (2006).

[23] *See* Ristroph, *supra* note 10, at 78-79.

struction, and communications. The corporation employs nearly 10,000 people, and has a shareholder population of around 11,000 members, to whom ASRC had allocated dividends totaling over $500 million through 2010.[24] As we shall see, the ASRC provides a critical counterpoint to Inupiat opponents of extractive industry in the U.S. Arctic.

IV. The Legal and Regulatory Framework for Offshore Oil and Gas Drilling in Arctic Alaska

A full explanation of the regulatory universe surrounding offshore oil and gas exploration in the United States is beyond the scope of this essay.[25] Nonetheless, there are a number of federal statutes that apply to offshore oil and gas drilling on the OCS that, as a preliminary matter, bear noting. The National Environmental Policy Act (NEPA) imposes environmental review requirements on the federal government in order to ensure that the government makes major decisions potentially affecting the environment only after considering the environmental impacts of those decisions and exploring possible alternatives to proposed actions.[26] The Clean Water Act requires a leaseholder on the OCS to submit an oil spill response plan (OSRP), which is "a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance."[27] The Endangered Species Act requires leaseholders whose otherwise lawful activities might result in the taking of a listed threatened or endangered species to obtain an incidental take permit.[28] The Marine Mammal Protection Act requires leaseholders to obtain incidental take and/or incidental harassment authorizations for maritime activities in certain circumstances.[29] The Clean Air Act requires that drill ships obtain permits and/or satisfy certain technology-based standards.[30]

The Outer Continental Shelf Lands Act (OCSLA) is the primary legislation affecting offshore oil and gas development in the Alaskan Arctic.[31] According to the U.S. Congress, OCSLA was created because "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."[32]

The OCSLA prescribes a four-stage process for offshore oil and gas development in a given offshore area. First, the U.S. Department of Interior formulates a five-year lease sale schedule and crafts an accompanying programmatic environmental impact statement pursuant to

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[24] Alaska Oil and Gas Association (AOGA), 2011 North Slope Borough Report *available at* http://www.aoga.org/facts-and-figures/economic-impact-reports/2011-north-slope-borough

[25] For a more comprehensive account *see* Polar Law Textbook II, 175-183, (Natalia Loukacheva ed., Nordic Council of Ministers, Norden 2013) (chapter focusing on "Oil and Gas Regulation in the United States Arctic Offshore"); Betsy Baker and Roman Sidortsov, *The Legal and Regulatory Regime for Offshore Hydrocarbon Resources in the U.S. Arctic*, 2014 A.B.A. Sec. Env't, Energy, Resources.

[26] 42 U.S.C. §§ 4321, 4331. Notably, among NEPA's many analytic requirements is the requirement that the government and/or permit or lease applicant analyze "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b) (5). NEPA, however, does not require consideration of risks that are "merely speculative" or "infinitesimal." No GWEN Alliance v. Aldridge, 855 F.2d 1380, 1386 (9th Cir.1988); Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy, 383 F.3d 1082, 1090 (9th Cir.2004).

[27] 33 U.S.C. § 1321(j) (5) (A)(i).

[28] 16 U.S.C. § 1539(a)(1)(B).

[29] 16 U.S.C. § 1371(a)(5).

[30] 42 U.S.C. § 7627.

[31] 43 U.S.C. § 1301 *et seq.* (2012); 30 C.F.R. pt. 250 (2013) (together comprising the OCSLA).

[32] 14 U.S.C. § 1332(3).

NEPA. Second, the Department conducts lease sales for specific tracts on the outer continental shelf, providing an area-wide environmental impact statement for each lease sale. Third, the lessee must obtain government approval of an exploration plan ("EP"). The EP must include a project-specific environmental impact analysis assessing the potential effects of the proposed exploration activities. The agency then conducts its environmental review pursuant to NEPA, and must disapprove the EP if any activity would result in "serious harm or damage" to the marine, coastal, or human environment.[33] Fourth, and finally, offshore oil and gas lessees must submit and have approved development and production plans, which, again, must go through environmental review and comply with other permit requirements. (The Department of Interior recently issued new implementing regulations rules specific for offshore oil and gas exploration in the Arctic.[34] However, because those rules post-date the litigation discussed in this essay I will not discuss them any further herein.)

The litigation that is the subject of this study originates in 2002, when the federal agency formerly known as the Minerals Management Service (MMS) issued a five-year plan establishing lease sale schedules on the Outer Continental Shelf in Alaska. The agency conducted an environmental review pursuant to the NEPA and then a supplemental environmental review, and in 2003 sold a lease to Shell Oil for offshore areas in the Beaufort Sea. Subsequently, Shell submitted an Exploratory Plan, proposing to drill up to twelve exploratory wells in several prospects over a three-year period. After some back and forth, in 2007 MMS approved the Exploratory Plan and issued an Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI) pursuant to NEPA.

There are a number of major problems confronting Arctic oil and gas exploration in any circumstance: the harsh climate and extended periods of darkness, the presence of sea ice, the remoteness of the area, the need for specially designed equipment, and the lack of fully operational search-and-rescue infrastructure, to name a few.[35] The possibility of an oil spill represents perhaps the most significant problem, certainly in regards to mobilizing opposition.[36] Compounding these necessarily complicating factors, Shell in 2007 proposed to drill in areas within the migratory path of the bowhead whale, a species at the center of Inupiat subsistence culture on the North Slope. Several lawsuits were quickly filed by Alaska Natives and by environmental advocacy groups. In these lawsuits and those that followed, the conflicting narratives regarding the meanings of the Arctic and applicability of the law to it are made apparent.

V. Arctic Tales

As climate change impacts in the Arctic have become increasingly visible and more accessibly broadcast, and as scholars from various

[33] 43 U.S.C. § 1340(c); 30 C.F.R. § 250.202(e).

[34] Department of Interior: Bureau of Ocean Energy Management (BOEM) & Bureau of Safety and Environment and Enforcement (BSEE) Review of Alaska Outer Continental Shelf Oil & Gas Drilling Standards, Docket ID: BOEM-2013-0035, www.regulations.gov/#!docketDetail;D=BOEM-2013-0035 (last visited July 30, 2013);

[35] *See, e.g.*, *Review of Shell's 2012 Alaska Offshore Oil and Gas Exploration Program*, Rep. to the Sec'y of the Interior (March 8, 2013), *available at* www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf.

[36] *See e.g.*, Charles Emerson Glada Lahn & Chatham House, Lloyd's, Arctic Opening: Opportunity And Risk In The High North 39 (2012); Ernst & Young, *supra* note 6, at 5; Arctic Monitoring and Assessment Programme (AMAP), Arctic Council, AMAP Assessment 2007, *Oil and Gas Activities in the Arctic*, Vol. 1, at 2-212 (2010); Nuka Research And Planning Group, U.S. Arctic Program, PEW Environment Group, Oil Spill Prevention And Response In The U.S. Arctic Ocean, Unexamined Risks, Unacceptable Consequences 28 (Nov. 2010).

disciplines and journalists working different beats have turned their attentions to the North, a number of discourses have emerged to define the "new" space. At the risk of being absurdly reductionist, I would suggest that the Arctic is now characterized by five general discourses: (1) the scientific discourse, which emphasizes the study of climate change impacts in the Arctic and the role of a changing Arctic in amplifying global climate change effects; (2) the indigenous discourse, which emphasizes the rights, status, and voice of indigenous peoples who inhabit the region; (3) the economic discourse, which emphasizes the natural resources extraction and economic development opportunities available in the region; (4) the preservationist discourse, which emphasizes the conceptualization of the Artic as a kind of planetary wilderness; and (5) the international discourse, which emphasizes the military and governance issues surrounding the region's newfound accessibility to people from the south.

The litigation over Shell's attempt to drill in the Beaufort Sea is a useful case study because it has become a battleground for competing narratives about the Arctic that are deeply imbedded in American environmental thought and that reflect several of the central discourses mentioned just above. At its core, the battle pits three well-established storylines against each other:

- The Arctic as Classical Frontier: An extractive periphery that primarily serves the businesses and consumers at civilization's core.
- The Arctic as Spiritualized Frontier: A region beyond the known world containing a romantic wilderness that deserves, or demands, preservation.
- The Arctic as Neutral Space: A geographical area largely though not entirely devoid of symbolic significance, appropriately subject to the same technocratic, managerial organization imposed elsewhere by environmental and natural resources law.[37]

In addition, two other storylines feature importantly in the litigation, incorporating into the fray indigenous perspectives too often marginalized or excluded:

- The Arctic as Ancestral Homeland: A place of ancient stories and memories and of contemporary subsistence culture.
- The Arctic as Developing World: An economically disadvantaged region in a globalized world that is in need of sustainable development.

It is unnecessary, for my purposes here, to weigh or assess the comparative legitimacy of these competing storylines. The important thing here is that each one would have a particular vision of the region, indeed an entire worldview, encapsulated by the word "Arctic." In the next sections I describe how it is that these storylines have come to be so directly in conflict.

A. Alaska Wilderness League v. Kempthorne

In 2007, representatives of the North Slope Inupiat communities and a number of environmental groups filed separate lawsuits in the Ninth Circuit Court of Appeals, challenging MMS's approval of Shell's Exploratory Plan.[38] The lawsuits, the government and industry responses, and the Ninth Circuit Court of Appeals' opinion deploy several of the competing Arctic narratives described earlier: *Arctic as Ancestral Homeland*, *Arctic as Spiritualized Frontier*, *Arctic as Classical Frontier*, and *Arctic as Neutral Space*.

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[37] The first two characterizations derive from the set of tropes discussed in The Environmental Imagination, and in Greg Garrard, Ecocriticism (2004). The final characterization is discussed in Burger, *Environmental Law/Environmental Literature*, *supra* note 2.

[38] Alaska Wilderness League v. Kempthorne, 548 F.3d 815, 819 (9th Cir. 2008), *withdrawn*, 559 F.3d 916, *dismissed as moot*, 571 F.3d 859.

(i) The Arctic as Ancestral Homeland

The North Slope Inupiat plaintiffs (the North Slope Borough and the Alaskan Eskimo Whaling Council) argued MMS did not take the required "hard look" at the potential impacts to subsistence resources—including bowhead whales, beluga whales, caribou, and fish—and Inupiats' use of them.[39] The Inupiat plaintiffs argued the proposed drilling and icebreaking activities, occurring at an "unprecedented" scale,[40] would disrupt bowhead migration patterns, which would increase the risk to whale hunters, who would have to follow the bowheads further offshore. They also argued that movement of drilling rigs, icebreakers, and other vessels through the Chukchi Sea en route to the Beaufort would alter beluga migration patterns, affecting the traditional beluga hunt at Pt. Lay,[41] and that increased activities associated with drilling, including helicopter and truck traffic, could disrupt caribou, another important traditional subsistence resource.[42] Thus, the North Slope Inupiat plaintiffs emphasized the centrality of subsistence hunting to the life and culture of the Inupiat villages, a way of life that has existed "for thousands of years" and that embodies "cultural, social and spiritual values that are the essence of Inupiat heritage."[43]

(ii) The Arctic as Spiritualized Frontier

The environmental groups described the Arctic in ways that will be familiar to anyone familiar with the American idea of wilderness. First, the groups noted the potential impacts on three icons of the American wilderness movement: the Arctic National Wildlife Refuge, the bowhead whale, and the polar bear.[44] Second, they highlighted the wilderness qualities of the region, describing how "[v]ast expanses of this area are untouched by industrial activity and provide important habitat for thousands of species of animals, birds, and fish, including endangered and threatened species."[45] Finally, they warned of the "potentially catastrophic impacts of a crude oil spill,"[46] noting that an oil spill would be particularly harmful because scientists and regulators know so little about the effects of such an event in the Arctic and because there are no proven methods for dealing with it. Thus, in emphasizing the area's relationship to wilderness icons and its wilderness qualities the environmentalists situated it within the familiar storyline of America's spiritualized frontier.

(iii) The Arctic as Neutral Space

In its brief, the U.S. Department of Justice (DOJ) laid out the overlapping environmental review and oil and gas leasing processes in a clear sequence and referred to the authority given to federal agencies to grant authorizations for incidental takes and harassment of marine mammals and polar bears.[47] Also, in direct contrast to plaintiffs' claims that the proposed scale of drilling in the region would be "unprecedented," the DOJ explained that "[o]il and gas exploration is not a new phenomenon in the Beaufort Sea" and indicated that seven lease sales were held "in the same area of the OCS between 1979 and 1988,

[39] Brief of Petitioners North Slope Borough and Alaska Eskimo Whaling Commission in 07-72183 at 5, *Alaska Wilderness League*, 548 F.3d 815 (No. 07–72183), 2007 WL 3114589 ("Pet. N. Sl. Br. 1").
[40] *Id*. at 23.
[41] *Id*. at 12–13.
[42] *Id*. at 14–15.
[43] *Id*. at 8.
[44] Petitioners' Consolidated Brief in Numbers 07-71457 and 07-71989 at 1, 13, *Alaska Wilderness League*, 548 F.3d 815 (Nos. 07-71457, 07-71989), 2007 WL 3114590 ("Pet. Con. Br.").
[45] *Id*. at 5.
[46] *Id*. at 1, 13.
[47] Brief of Respondents in 07–71457, 07–71989, 07–72183 at 7–8, *Alaska Wilderness League*, 548 F.3d 815 (Nos. 07-71457, 07-71989, 07-72183) ("DOJ Br.").

resulting in the issuance of 688 leases and the drilling of 30 exploration wells."[48] This experience in the region has resulted in one offshore field being in active production for more than a decade,[49] federal agencies' possessing "extensive knowledge of wildlife resources and subsistence harvest patterns," "protective measures for these resources" being put into place, and a "workable method" for applying NEPA to oil and gas production in the region.[50] Thus, the federal government advanced the vision of the "Alaska Arctic" as a place already largely impacted by industrialization and properly managed under existing environmental laws.

(iv) The Arctic as Classical Frontier

Shell offered its own gloss on the facts presented by DOJ, painting a picture of the Arctic as an extractive periphery, a resource frontier that exists to serve the nation's energy interests. According to Shell, the important thing is not that the Beaufort Sea is in the Arctic but that it is on the Outer Continental Shelf.[51] In this construction of the Arctic, concerns about impacts on the human, marine, and coastal environment are properly balanced against the more weighty interests of industrial expansion and energy independence.

(v) The Ninth Circuit Court of Appeals' Opinion

The Ninth Circuit held MMS did not adequately analyze the site-specific impacts of noise on bowhead whales and their migratory patterns or the impacts of drilling on other subsistence hunting and fishing activities at the specific proposed sites.[52] In reaching this decision, the court mediated between the two sides, voicing its dissatisfaction with the agency's discounting its own experts' concerns about these impacts[53] but finding the analysis of a potential oil spills impact was adequate.[54] The court also evinced sympathy for the competing narratives: Its recitation of facts largely tracked plaintiffs' accounts of the geography and wildlife resources in the Beaufort, noise impacts, and the centrality of subsistence hunting to the Inupiat way of life,[55] and acknowledged that Shell's drilling would be the first in an potential wave of new operations,[56] all "located in an increasingly fragile ecosystem." On the other hand, the court also recognized that the project is located in a "region [that] continues to develop,"[57] thereby explicitly acknowledging the government's view that development is already ongoing and further development is inevitable.

A dissenting opinion offered an alternative response, essentially adopting the trope of the Classical Frontier. The dissent announced at the outset that "Under OCSLA, the Secretary of the Interior and, by delegation, MMS, are charged with ensuring the 'vital national resource reserve' of the Outer Continental Shelf be made available for expeditious and orderly development, subject to environmental safeguards."[58] Thus, like Shell, the dissent urged that development under OCSLA trumps protection under NEPA. In addition, the dissent accepted the government's storyline of the Arctic as neutral space, properly subject to the expertise of the government. Deci-

[48] *Id*. at 8.

[49] *Id*.; *See also AOGCC Pool Statistics, Northstar Unit, Northstar Oil Pool*, Alaska Oil and Gas Conservation Commission, *available at* http://doa.alaska.gov/ogc/annual/current/18_Oil_Pools/Northstar-%20Oil/1_Oil_1.htm (last visited Apr. 29, 2013).

[50] DOJ Br., *supra* note 48, at 9.

[51] Brief of Respondent-Intervenor Offshore Inc. in 07–71457, 07–71989, 07–72183 at 3, *Alaska Wilderness League*, 548 F.3d 815 (Nos. 07-71457, 07-71989, 07-72183) ("Shell Br.").

[52] *Alaska Wilderness League*, 548 F.3d at 825.

[53] *Id*. at 819.

[54] *Id*. at 832–33.

[55] *Id*. at 820.

[56] *Id*. at 818.

[57] *Id*. at 833–34.

[58] *Id*. at 840–41.

sions made by the experts, especially when on the "frontiers of science," warrant extraordinary deference, which the dissent found lacking.[59]

B. Round Two: Village of Point Hope v. Salazar

In 2009, Shell submitted a new Exploratory Plan for the Beaufort Sea and proposed to drill up to two exploration wells on either of two separate prospects during the open-water season in 2010, using a single drill ship. Shell agreed to measures that would avoid interference with the fall subsistence bowhead whale hunt by the Native villages of Kaktovik and Nuiqsut. At around the same time, Shell also submitted an Exploratory Plan to drill up to three wells for the same season on leases in the Chukchi Sea that Shell had acquired in a separate lease sale. Shell proposed to use the same single drill ship in both the Beaufort and Chukchi seas. MMS approved both plans and issued EAs and FONSIs in support of the approvals.

Again, Shell's plans were met with immediate resistance. A coalition including the Native Village of Point Hope; a network of Alaska Natives of the Inupiat, Yupik, Aleut, Tlingit, Gwich'in, Eyak, and Denaiana Athabascan tribes called Resisting Environmental Destruction on Indigenous Land (REDOIL); and environmental advocacy organizations filed suit, challenging both actions (the Environmental/Native Plaintiffs).[60] The Alaska Eskimo Whaling Commission and the Inupiat Community of the North Slope (the North Slope Inupiat Plaintiffs) also again brought suit.[61] The conflicting narratives from the previous lawsuit were revived, but with several interesting twists.

For example, the Environmental/Native Plaintiffs hybridized the tropes of the Spiritualized Frontier and Ancestral Homeland, emphasizing the close associations between subsistence hunting, cultural practices, and community values and identity; the importance of certain wildlife species, including bowhead, beluga, Pacific walrus, long-tailed ducks, and murres; the threat of a catastrophic oil spill; and the severity of Arctic conditions.[62] The North Slope Inupiat Plaintiffs offered something of a more romantic view of the indigenous perspective than in the previous case, claiming that "The Inupiat have relied on the subsistence resources of the Arctic Ocean *since time immemorial* to carry on their indigenous traditions,"[63] and providing a far more nuanced, intimate, and humanized description of the bowhead's breeding, migration habits, and physiology.[64] These rhetorical moves stake a claim to nativity, traditional knowledge, and subsistence culture in an ancestral homeland. The federal government again adopted the trope of Arctic as Neutral Space, though arguably the government's narrative stance was even more extreme.[65] Indeed, the government's defense was almost wholly procedural, involving the quantity and quality of information analyzed and the satisfaction of the forgiving arbitrary and capricious standard of judicial review. Shell also adopted the same storyline as in the first case, but

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[59] *Id*. at 842–44.

[60] Petitioners' Consolidated Brief in Numbers 09–73942 and 10–70166, Native Village of Point Hope v. Salazar, 378 Fed. Appx. 747 (9th Cir. 2010) (Nos. 09–73942, 10–70166), 2010 WL 1219036 ("Pet. NVPH Br.").

[61] Petitioners Alaska Eskimo Whaling Commission and Inupiat Community of the Arctic Slope's Opening Brief on the Merits, *Native Village of Point Hope*, 378 F. App'x. 747 (Nos. 10-70368, 09-73942, 09-73944, 10-70166), 2010 WL 5650115 ("Pet. N. Sl. Br. 2").

[62] Petitioners' Consolidated Brief in Numbers 09–73942 and 10–70166, *Native Village of Point Hope*, 378 F. App'x. 747 (Nos. 09–73942, 10–70166), 2010 WL 1219036 ("Pet. NVPH Br.").

[63] Pet. N. Sl. Br. 2, *supra* note 62, at 1 (emphasis supplied).

[64] *See id*. at 10–15.

[65] Brief of Respondents, *Native Village of Point Hope*, 378 F. App'x. 747 (Nos. 10-70368, 09-73942, 09-73944, 10-70166), 2010 WL 5650117 ("DOJ Br.").

here Shell told a story in which drilling in the Arctic is a necessary part of President Obama's economic development and energy security policies.[66]

In addition, two new storylines were introduced:

(i) The Arctic as Developing World

Several Alaska Native Corporations with shareholders who reside on the coast of the Beaufort and Chukchi seas, including the Arctic Slope Regional Corporation, submitted amicus briefs in support of Shell's proposal.[67] The ANCs' express goal in entering the litigation was "to provide the Court with a more comprehensive picture of Iñupiaq Eskimos' views of North Slope offshore outer continental shelf ('OCS') oil and gas exploration and development than the Court could glean from" the plaintiffs' various briefs.[68] Thus, ANCs instituted a competition over who represented the Native Alaskan community and whose self-description was the better one.

The ANCs presented a storyline in which communities and cultures in dire economic circumstances would be saved by oil and gas drilling in the Arctic Ocean. According to the ANCs, the majority of jobs (55 percent) in the North Slope are government positions, and the region experiences depopulation in down economic times. The communities of the North Slope also experience high dropout rates and unemployment.[69] Oil and gas exploration and development, however, promise to provide jobs, prosperity, and an economic core to the region, thereby strengthening the security of its most vulnerable residents. Moreover, the ANCs would receive direct financial benefits from Shell's projects; using their hiring preference and payment of stock dividends, ANCs would build up local capacity and directly pass benefits on to local Iñupiaq Eskimo communities. In addition, Shell's drilling plan would also produce secondary benefits for both the North Slope and Alaska, such as increasing tax revenues and benefitting local suppliers and the service industry.[70] Ultimately, the ANCs argued, millions of dollars in operations contracts, aviation contracts, and secondary benefits were at stake.

(ii) The Arctic as Alaska

The State of Alaska also weighed in as amicus in this case, and crafted a portrait of the Arctic that resonated with other storylines presented by Shell, the federal government, and the ANCs. "As the owner of adjacent land and the state whose government and residents stand to gain from the jobs, revenue and economic development at stake," the State, like the ANCs, supported approval of the Exploration Plans for economic reasons. "As a sovereign that must itself make difficult decisions about public land use," the State, like the federal government, commended the balance struck between environmental protection and energy production and the rule of law through which the decision was made.[71] Also, like Shell, the State depicted the Arctic as a tradi-

[66] Brief of Respondents-Intervenors Shell Offshore Inc. and Shell Gulf of Mexico Inc., *Native Village of Point Hope*, 378 F. App'x. 747 (Nos. 10-70368, 09-73942, 09-73944, 10-70166), 2010 WL 5650118, ("Shell Br.").

[67] *See* Joint Brief Amici Curiae of Ukpeagvik Iñupiat Corporation, Olgoonik Corporation, and Kaktovik Inupiat Corporation in Support of Briefs by Federal Respondents and Respondents-Intervenors, *Native Village of Point Hope*, 378 F. App'x. 747 (Nos. 10-70368, 09-73942, 09-73944, 10-70166), 2010 WL 5650120 ("ANC Amicus Br."). *See also* Brief for Amici Curiae Arctic Slope Regional Corporation and Tikigaq Corporation in Support of Respondents-Intervenors Shell Offshore Inc. and Shell Gulf of Mexico Inc., *Native Village of Point Hope*, 378 F. App'x. 747 (Nos. 10-70368, 09-73942, 09-73944, 10-70166), 2010 WL 5650119.

[68] ANC Amicus Br., *supra* note 68, at iii.

[69] *Id*. at 10–11.

[70] *Id*. at 9–10.

[71] Intervenor State of Alaska's Brief in Support of Respondents *Native Village of Point Hope*, 378 F. App'x. 747

tional resource frontier, noting that the "Beaufort and Chukchi are massive areas roughly the size of Texas and California combined that are largely untapped as a natural resource"[72] and that domestic energy production would improve the nation's energy security.[73] Interestingly, the State also added an international environmental justice component to this storyline: by not exploiting domestic resources, the nation exports the environmental costs of production to foreign nations, where environmental protections are often less stringent than in the United States.[74]

(iii) The Ninth Circuit Opinion

The Ninth Circuit's decision was remarkably concise, declaring that the court had reviewed the record but that under the deference owed to the administrative agency the permits would stand.[75] In its brevity, its focus on the narrow legal arguments presented by plaintiffs and its adherence to the formal standards of deference to the agency the decision implicitly affirmed the construction of the Arctic as a neutral space while dissociating the court's process from the narrative content of the parties' briefs.

C. Round Three: The Petition for Rehearing En Banc

Explicit reference to "the Arctic" was notably absent from the litigation literature, up to this point. To succeed in obtaining a rehearing *en banc*, however, the plaintiffs had to demonstrate that reconsideration was necessary because the matter is of "exceptional importance."[76] Accordingly, the Environmental/Native Plaintiffs and the North Slope Inupiat Plaintiffs both argued that the Arctic, as "the Arctic," is of national significance.

The Inupiat plaintiffs declared, "This case involves issues of exceptional importance to the Nation's interests in the natural and non-renewable resources of the U.S. Arctic," including the wildlife and the "subsistence-based economy of the Inupiat coastal communities of Northern Alaska."[77] They warned that the risk of an oil spill is great in "the Arctic, a region defined not only by unique wildlife but also by rough seas and notorious weather made worse by climate change, floating pack ice, and limited shore-based infrastructure,"[78] and that "[i]ncreased industrial activity threatens to impose unprecedented harm on the wildlife and people of the Arctic, who already struggle with the rapidly increasing impacts of climate change."[79]

The Environmental/Native Plaintiffs told a similar story, but one that specifically called attention to the traditional resource frontier storyline underlying Shell's arguments: "In their search for oil, companies are embarking on a new era of offshore drilling in deeper water, as in the Gulf of Mexico, and in more remote and sensitive areas, as in the Arctic Ocean at issue in this case."[80] These remote and sensitive areas are, in fact, "new frontiers."[81] And the Arctic is a unique and special instance of the category:

> "[The] Arctic supports an extraordinary diversity of species and a vibrant indigenous subsistence culture found nowhere else in the world, but the delicate balance that creates this biological and cultural splendor is under stress. Climate change has decreased

(Nos. 10-70368, 09-73942, 09-73944, 10-70166), 2010 WL 5650116 ("Alaska Br.") at 1.

[72] *Id*. at 2.

[73] *Id*. at 4–5.

[74] *Id*. at 7–8.

[75] Native Village of Point Hope v. Salazar, 378 F. App'x. 747 (9th Cir. 2010).

[76] Fed. R. App. P. 35(a) (2009).

[77] Pet. AEWC En Banc Br. at 4.

[78] *Id*. at 5.

[79] *Id*. at 5.

[80] Pet. NVPH En Banc Br., *supra* note 61, at 1.

[81] *Id*.

> the sea-ice upon which much of the wildlife of the Arctic depends, altering habitat and threatening species such as the polar bear with extinction. Now, Shell's drilling plans, which are only the first in a series of new offshore drilling prospects in the Arctic Ocean, bring further strain from noise and disturbance – and the threat of a devastating oil spill to the Arctic, its wildlife, and its people.[82]

The briefs submitted by the federal government, Shell, and Alaska in opposition to the *en banc* petition all denied that there is anything special about "the Arctic." Instead, consistent with the trope of the Arctic as Neutral Space, the briefs focused on the narrower, technical question of agency expertise and the relative unimportance of the specific legal questions posed for review.

The petition was denied.

D. Round Four: Native Village of Point Hope v. Salazar II

Due to a federal moratorium imposed in the wake of the Deepwater Horizon blowout, Shell did not drill in 2010.[83] The next year, the company submitted a revised Exploration Plan to the Bureau of Ocean Energy Management (BOEM) and a revised oil spill response plan to the Bureau of Safety and Environmental Enforcement (BSEE), MMS's successor agencies. Again, there was litigation. But the tone of the litigation is emblematic of the triangulation of the competing narratives. In the period between the imposition of the moratorium and the new plans, U.S. environmental groups had made drilling in the Arctic a central part of their political and fundraising platforms, calling for members to "Save the Polar Bear Seas," to "Protect the Fragile Arctic Ocean." to "Keep Shell Out of the Arctic," and to make "national treasure" of "the Arctic's remote and undeveloped seas" should be "off limits to oil drilling." Yet, the complaint focused on the highly technical issue of the alleged inadequacy of the emergency oil spill containment and response plan in a fragile environment already impacted by climate change.[84] Tellingly, the attorney arguing the case for the Environmental/Native plaintiffs announced to the Ninth Circuit panel at oral argument that although the issues "strike at the heart of an oil company's ability to stop and control an oil spill on the outer continental shelf, the court's resolution of these issues will be founded … in nothing more than the hallmark principles of administrative law."[85]

E. Postscript

The saga has reached an anticlimactic end for Shell – at least as of the time of this writing. In September 2012 Shell began drilling its first pilot hole in the Chukchi Sea. It stopped the next day, when it had to move its rig to avoid sea ice. The company did begin drilling again, but shut down after only a week, announcing that it was done for the season. Shell similarly halted exploratory drilling in the Beaufort after only three weeks. Subsequently, in December 2012, the oil rig Kulluk, one of Shell's two rigs, ran aground in the Gulf of Alaska. And ten days later the United States Environmental Protection Agency announced that both drill ships had violated their Clean Air Act permits. In March

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[82] *Id*. at 2–3.

[83] U.S. Dep't of the Interior, Decision Memorandum Regarding the Suspension of Certain Offshore Permitting and Drilling Activities on the Outer Continental Shelf, July 12, 2010, at 1, *available at* http://www.doi.gov/deepwaterhorizon/upload/Salazar-Bromwich-July-12-Final.pdf.

[84] *See e.g.*, Petitions for Review of Department of Interior Decisions (Apr. 3, 2012), 2012 WL 1232359, at 28–34.

[85] Recording of the Oral Argument, Native Village of Point Hope v. Salazar, 680 F.3d 1123 (9th Cir. 2012) (No. 11-72891) (available at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000009186).

2013, the Department of Interior announced it would investigate Shell's Arctic operations. Soon thereafter, Shell declared that it would not drill in 2013. DOI's report ultimately concluded that Shell was not fully prepared to drill in the Arctic and recommended that company further study and improve its program.[86]

The federal government and Shell continued to host public meetings and other forums on the North Slope and around Alaska. But, in January 2014 the Ninth Circuit held that the environmental review prepared for the 2008 lease sale in the Chukchi Sea failed to adequately evaluate the scale of production that could result.[87] The next week Shell announced that it would not drill, again, during the upcoming summer season, and raised questions about the likelihood of drilling at all in the near future.[88]

VI. Offshore Oil and Gas Activities in the U.S. Arctic and Indigenous Peoples Rights

This Symposium called on the gathered presenters and participants to examine extractive industries in the Arctic and ask: "What about environmental law and indigenous peoples' rights?" The above account demonstrates that environmental and natural resources law in the U.S. functions in the Arctic much the same as it does everywhere else within the nation's domestic territory, with courts serving as a critical backstop that ensures a degree of environmental protection while ultimately deferring to agency expertise where clear errors are lacking and adequate process has been provided. But what about indigenous peoples rights?

In "Extractive Industries and Indigenous Peoples" the report of the Special Rapporteur on the Rights of Indigenous Peoples,[89] James Anaya identifies numerous provisions of international law[90] that pertain to the operation of extractive industries in indigenous territories, in areas "that are of cultural or religious significance to [indigenous peoples] or in which they traditionally have access to resources that are important to their physical well-being or cultural practices," and in instances where "extractive activities otherwise affect indigenous peoples, depending upon the nature of and potential impacts of the activities on the exercise of their rights."[91] The extension of indigenous peoples rights to areas beyond those over which they claim sovereignty or exclusive jurisdiction, and even potentially beyond indigenous territories, is important because the Outer Continental Shelf is not, under U.S. law, under Inupiat control, and because at least some of the areas where drilling is to occur are not traditional whaling, fishing or hunting areas. Looking, then, at the Shell litigation in light of the Report—without revisiting the legitimacy of the previous determination of rights under ANCSA, without analyzing the status of Native Alaska lands as something other than "Indian Country" under U.S. law, and with the awareness that this analysis is of a general and preliminary nature—

[86] Review of Shell's 2012 Alaska Offshore Oil and Gas Exploration Program, *supra* note 9.

[87] Native Village of Point Hope v. Jewell, 740 F.3d 489, 505 (9th Cir. 2014).

[88] *See, e.g.*, Steven Mufson, *Shell says it won't drill in Alaska in 2014, cites court challenge*, Wash. Post, Jan. 30, 2014.

[89] U.N. Human Rights Council, *Report of the Special Rapporteur on the right of indigenous peoples*, A/HRC/24/41 (Sept. 6, 2013) (*prepared by* James Anaya).

[90] Among other things, Special Rapporteur Anaya points to the United Nations Declaration on the Rights of Indigenous Peoples, the International Labour Organization (ILO) Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries, arts. 13–15; the International Covenant on Civil and Political Rights, arts. 1 and 27; and the International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (d) (v), as well as the Principle of Free, Prior and Informed Consent. *See Report*, at 8–11, 19, 26, 37, 44, 52, notes 5–7, 13, 19.

[91] *Id.* at 27.

I would argue that the system in place in the U.S. appears to comport with the rights to freedom of expression and to participation; the principle of free, prior and informed consent; and the requirement that the U.S. create a regulatory regime that protects indigenous peoples rights.

Special Rapporteur Anaya explains that, consistent with the rights to freedom of expression and participation, "indigenous individuals and peoples have the right to oppose and actively express opposition to extractive projects, both in the context of State decision-making about the projects and otherwise."[92] Clearly, Alaska Natives have exercised these rights, as participants in administrative processes and as plaintiffs in lawsuits – both winning and losing. At the same time, Alaska Natives have exercised the right to express their support for offshore oil and gas exploration, as well, participating as amici in the litigation in support of Shell and the federal government. This resonates with Special Rapporteur Anaya's observation that "it must not be assumed that the interests of extractive industries and indigenous peoples are entirely or always at odds with each other" and that "in many cases indigenous peoples are open to discussions about extraction of natural resources from their territories in ways beneficial to them and respectful of their rights."[93]

Given the complicated history of U.S.-Alaska Native relations and the internal divisions within Inupiat communities over offshore drilling, consistency with the principle of free, prior and informed consent is a tougher issue. On the one hand, the U.S. Supreme Court has not definitively resolved the outstanding questions of aboriginal title and Alaska Native hunting and fishing rights on the OCS, leaving open the question of whether ANCSA can be read as a form of consent.[94] On the other hand, one might point to the visible support of drilling within Inupiat communities, including from political and business leaders as evidence of consent. In addition, it could be argued that one of the exceptions to the principle of free, prior and informed consent applies in this instance – for instance, it could be argued that the impacts of offshore oil and gas drilling in Alaska's Arctic waters on Inupiat subsistence practices "would only impose such limitations on indigenous peoples' substantive rights as are permissible within certain narrow bounds established by international human rights law."[95] Nonetheless, it is likely that consultation, at a minimum, is required. Such consultation would be consistent with the rights to participation and self-determination, as well as rights to property, culture, religion and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects.[96] Although there may have been some issues in this regard in the early years, Shell's amendment to its plans in order to avoid undue impacts on bowhead and beluga populations and the federal government's intensive involvement in the unfolding events satisfy the consultation requirement.[97]

Finally, Special Rapporteur Anaya writes that States must provide "a regulatory framework that fully recognizes indigenous peoples' rights…that may be affected by extractive operations; that mandates respect for those rights both in all relevant State administrative decision-making and in the behavior of extractive companies; and that provides effective sanctions and remedies when those rights are infringed either by government or corporate actors."[98] The litiga-

[92] *Id.* at 19.
[93] *Id.* at 2.
[94] *See* David S. Case and David A. Voluk, Alaska Natives and American Laws 77-78 (2012) (3d ed.).
[95] *Id.* at 31.
[96] *Id.* at 27, 37.
[97] *See also id.* at 52–57 (discussing due diligence).
[98] *Id.* at 44.

tion story described above—and the background administrative procedures, including the tiers of environmental review and other required opportunities for public comment—offers evidence that the U.S. regulatory regime complies with this requirement. Indeed, the Department of Interior's recognition of the national importance of Inupiat culture and the central significance the review of impacts on subsistence practice has been given under NEPA underscore this point, as do the original court-ordered injunction in 2008 and the most recent one in 2014. Thus, even though the Inupiat plaintiffs, and their narrative of the ancestral indigenous homeland, have not and cannot stop drilling forever, their rights are recognized and judicial review provides a remedy for infringement.

VI. Conclusion

At the outset of this Essay I noted that the ways in which litigants and courts put forward and respond to conflicting narratives about nature—about the frontier, about the Arctic—and about the proper relationship between nature and culture raise a number of big questions about the law and its dominion. I do not pretend that my argument that the pro-managerial narrative that reads the Arctic as a neutral space gives an answer to those questions. Rather, the preceding pages have sought to clarify the important elements of domestic law—primarily under ANCSA and OCSLA—that set the stage for the Shell litigation, and to elucidate the ways in which these conflicting narratives have factored into it. In addition, I briefly addressed whether and how the Inupiat's narrative submissions comport with indigenous peoples' rights under international law. This study, though, may mark a first step. A comparative study of trans-Arctic narratives in extractive resource conflicts would be of real value, illuminating not only how indigenous peoples and others value and understand the place but also whether and how those values and understanding—whether and how those stories—matter for the law.

Mineral Activities on Sámi Reindeer Grazing Land in Sweden

*Maria Kristina Labba**

Abstract

Securing seasonal-based land areas is a key issue for Sámi reindeer herders. Loss of lands, to for example mineral activities, is probably the single greatest threat to reindeer herding in *Sápmi* today. In Sweden this development can be seen in light of the Governments Mineral Strategy from 2013 where the Government declares its interest to strengthen Sweden's position as a leading mining nation in the EU. This article highlights some lacks in the Swedish Minerals Act in question of protection for Sámi reindeer herders' property rights and questions the value of the protection for land areas of national interest for reindeer-herding according to the Swedish Environmental Code.

1. Introduction

The area in which the Sámi have herded reindeer in Sweden since time immemorial is called the *reindeer herding area*.[1] It is enormous, covering approximately a third of Sweden's total area from the high north to the southern mountain range.[2] The area, accommodating reindeers needs and different herding activities, is highly extensively used but of essential importance for the survival of Sámi reindeer herding.[3]

The bedrock in the area has significant geological potential consisting of concentrations of economically valuable minerals.[4] Statistics show that 183 new exploration permissions and 6 exploitation concessions were granted in 2012, the vast majority of which were located within the reindeer herding area.[5] In addition, the number of iron ore mines in Sweden can increase from 16 today to 30 within 6 years.[6] Sweden is internationally seen as an attractive country for investment in mining activities. Such a projected increase is not surprising, because, as compared to other countries, Sweden has a good investment climate with low taxes on minerals and good institutional conditions for mining activities. This was expressed in the Swedish Mineral Strategy in 2013, in which the Government also declared its interest in strengthening its position as a leading mining nation in the EU.[7]

This article aims to highlight some practical and legal challenges associated with the establishment of mineral activities in the Swedish reindeer herding area. I will not do any deeper legal analyze, but point at some incompatibili-

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[1] Reindeer Herding Act (1971:437), Section 3.

[2] The reindeer herding area in Sweden is part of Sápmi, the territory in which the Sámi people traditionally live and which also covers parts of Norway, Finland and Russia.

[3] Ealát, Reindeer Herders Voice, (2009), 27-31.

[4] Statistics from http://www.bergsstaten.se/lagar/bakgrund.htm (last visited February 3rd 2014) and Sveriges Mineralstrategi, 2013, 9-11.

[5] Bergverksstatistik 2012, Swedish Geological Survey, 38-39.

[6] Sveriges mineralstrategi, 2013, 11.

[7] Ibid, 3, 11–12 and 14. See more about Sweden's competitiveness in an international perspective in also Utvinning för allmän vinning – en ESO-rapport om svenska mineralinkomster, Rapport till Expertgruppen för studier i offentlig ekonomi, 2013:9.

ties between Sámi reindeer herders property and cultural rights, on the one hand, and the Swedish Minerals Act (1991:45) and the Swedish Environmental Code (1998:808), on the other, where the latter constitute the national legal framework in questions of concessions and permits for mineral activities in Sweden.

2. Sámi reindeer herding – in practice

Reindeer herding is a traditional Sámi livelihood and a vital part of the Sámi culture.[8] In Sweden, reindeer herding is organized into 51 different Sámi communities, a type of local organizations based on an existing Swedish association model.[9] Each community has outer geographical boundaries and varying numbers of reindeer and reindeer herding family groups, *siidas*.[10]

Reindeer herding is characterized by a close contact with nature; it represents a complex coupled system of interchange between animals and humans. In many of the Sámi communities the reindeer migrate from the western parts, close to the Norwegian national border, to the eastern coastal regions, and back again throughout the year.[11] Every land area has its own suitability for reindeer based on their natural and biological needs.

By and large, the herders follow the reindeer, and the grazing areas within a community can thus be divided into many small land areas that accommodate the different needs of the reindeer and the different herding activities. For example, there are specific areas for calving with female reindeer migrating to the same place every year in order to calve. There are also specific areas for summer grazing and calf marking. Beneficial late spring and summer grazing conditions are very important for reindeer, especially if the winter and spring grazing conditions have been difficult.[12] Herders express that winters have become increasingly problematic because of climate changes; rainfall during wintertime creates a hard ice layer on the ground through which reindeer cannot dig to get food.[13]

There are also areas for autumn grazing, slaughtering activities and rutting. In the early autumn, many Sámi slaughter reindeer while the reindeer are in very good condition, before the rut period starts.[14] When snow comes, the herders divide the reindeer into smaller herds, usually into s*iida* herds, that are spread out in the inland, and for many, in the denser coastal region in the east. Hence, there are also specific areas for grazing winter time.[15]

All different seasonally based areas comprised of grazing lands, old migration routes and areas for calving, marking, rutting etc. are needed to conduct Sámi reindeer herding and require vast areas to sustain the herds.

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[8] See English summery on pages 33–51 in SOU 2006:14 where the historical background and legal basis for Sámi reindeer herding in Sweden is described.

[9] Prop. 1971:51, 41.

[10] *Siida* is a Sámi word for a traditional nomadic community. See a more detailed description of the traditional reindeer herding *siida* in article Land Usage and Siida Autonomy by M. N. Sara in Arctic Review on Law and Politics, vol. 3, 2/2011.

[11] See more about the system of interchange between reindeer and humans in M.N. Sara, Reinen-et gode fra vinden, (2001), 15-80. In some Sámi communities, reindeer herders since time immemorial have crossed the Swedish Norwegian border with their reindeer. The border-crossing reindeer herding customs were first codified in the Lap Codicil from 1751, see Första Bihang eller Codecill till Gränsse Tractaten emellan Konunga RikerneSwerige och Norge. Lappmännerne beträffande, section 10.

[12] N. Kuhmunen, Renskötseln i Sverige förr och nu, (2000), 15 and 88.

[13] See for example http://samer.se/GetDoc?meta_id=4369 (last visited February 4th 2014).

[14] N. Kuhmunen, Renskötseln i Sverige förr och nu, (2000), 37-38

[15] Ibid. 53–54. See more about Sámi reindeer herding rights in the coastal region in the Swedish Nordmaling case, NJA 2011, s. 109.

3. Mineral activities

For a long time, the Swedish mining industry has been entirely dominated by state ownership.[16] *Luossavaara Kiirunavaara Aktiebolag* (*LKAB*), which is a huge stated-owned underground mining company, was founded in 1890 and is one of Sweden's oldest industrial companies. It is a world-leading producer of processed iron ore products for steelmaking with customers all over the world. *LKAB* is very important to Sweden as a source of income for the state and as a creator of employment opportunities in the northernmost region.[17] It is located in the city of *Kiruna*, within *Laevas* and *Gabna* Sámi communities.[18]

As profitability in mining has increased, more and more private companies have become interested in mining.[19] In the summer of 2013, a UK-based mining company started a drilling program in *Gállok*, a traditional reindeer herding area within *Jåhkkågaskka* and *Sirges*, two Sámi communities in *Jokkmokk* municipality. The drilling activities met opposition in form of demonstrations by local reindeer herders, the local people, environmental activists and others.[20] During the autumn of 2013, the intense debate about *Gállok* escalated; the critique was no longer only about mineral activities in that specific area, but on consequences for Sweden as a whole, economically and environmentally.[21] On one hand some contend that large international mining companies are exploiting the country, making huge profits and leaving devastated nature behind.[22] On the other hand, supporters argue that the mining industry creates jobs in rural areas and contributes to important technological developments.[23]

Besides the Mineral Strategy also the Minerals Act has been a core subject in the debate. Opponents assert that the act is far too liberal, because, for example, an exploitation concession *must* be granted if a deposit has been found which can potentially be utilized on an economic basis, and the location and nature of the deposit do not make it inappropriate to grant the applicant the concession.[24] Sámi reindeer herders express the act does not seem to comply with

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[16] Utvinning för allmän vinning – en ESO-rapport om svenska mineralinkomster, Rapport till Expertgruppen för studier i offentlig ekonomi 2013:9, 3–4.

[17] http://www.lkab.com/en/About-us/Short-Facts/ (last visited February 3rd 2014).

[18] See examples of how planned mining activities in the area affect reindeer herding in Environmental Impact Assessment (EIA) Kirunaprojektet, Hur påverkas rennäringen av förändringar i Kiruna, BRNT 2006;12. An EIA is required for projects that may have significant environmental effects, see the Swedish Environmental Code (1998:808), Chapter 6, section 1.

[19] Utvinning för allmän vinning – en ESO-rapport om svenska mineralinkomster, Rapport till Expertgruppen för studier i offentlig ekonomi 2013:9, 3–4.

[20] See for example http://sverigesradio.se/sida/avsnitt/285501?programid=1300, http://www.nrk.no/sapmi/tilspisset-situasjon-i-kallak-1.11177269 (last visited February 18th 2014) and http://www.dn.se/debatt/sverige-skanker-bort-tillgangar-i-sameland/ (last visited February 18th 2014).

[21] See for example the SVT documentary *Kampen om gruvan* about some of the debate from 2013 on mining in Sweden here http://www.svt.se/nyheter/amne/?tag=tag:story@svt.se,2011:UG_-_Kampen_om_gruvan (last visited February 28th 2014). See also an example of a debate article on this issue here; http://www.dagensarena.se/opinion/skandalos-behandling-av-norrland/ (last visited April 8th 2014).

[22] Utvinning för allmän vinning – en ESO-rapport om svenska mineralinkomster, Rapport till Expertgruppen för studier i offentlig ekonomi 2013:9 and http://www.svd.se/opinion/brannpunkt/satt-granser-for-exploatering_8997570.svd (last visited February 18th 2014).

[23] The report Utvinning för allmän vinning – en ESO-rapport om svenska mineralinkomster, Rapport till Expertgruppen för studier i offentlig ekonomi 2013:9, 3. See also a debate article by the Swedish Minister for Enterprise on the advantages of mineral activities here http://www.dn.se/debatt/hoga-miljokrav-pa-gruvor-motiverar-lag-mineralavgift/ (last visited April 7th 2014).

[24] See Minerals Act (1991:45), Chapter 4, Section 2 where it is stated that a concession shall be granted if a deposit has been found which can probably be utilized on an economic basis and the location and the nature of the deposit do not make it inappropriate to grant the applicant the concession applied for.

the international standards in the case of mining activities on indigenous peoples' land areas when for example the principle on required free, prior and informed consent from reindeer herders affected by planned mineral projects is not implemented.[25] The principle provides that extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent.[26] The principle is stated in article 10 in the United Nations Declaration on the Rights of Indigenous Peoples, UNDRIP, an international instrument that Sweden has voted in favour.[27] Although it has a non-binding nature, it has been considered to have the potential effectively to promote and protect the rights of the world's indigenous peoples.[28] Reindeer herders' property rights are also protected by the Swedish Constitution and the Swedish Reindeer Herding Act.[29] But when decisions on expropriation for mineral activities are made firstly out from the Minerals Act, the protection in for example the Reindeer Herding Act seems to have a minor practical significance.[30]

4. The Rönnbäcken Case

The Rönnbäcken case illustrates some practical and legal challenges associated with the establishment of mineral activities in the Swedish reindeer herding area. The case started when the Chief Mining Inspector in Sweden in June 2010 and October 2012 granted exploitation concessions to a private mining company in the area of *Rönnbäcken,* a traditional reindeer herding area within *Vapsten*, a Sámi Community (hereafter *Vapsten*). The concessions were granted according to the Minerals Act, Chapter 8, Section 1. *Vapsten* appealed the decisions to the Government and requested for an oral hearing and for the Government to obtain a statement from the Sámi Parliament. The Government, which handled the appeals jointly according to the request from *Vapsten*, decided in August 2013 to reject the appeals and instead to give the concessions to the private mining company to establish three open pit mines in the area of *Rönnbäcken*.[31]

The land area in the case is legally of national interest for both reindeer herding and mining activities according to the Swedish Environmental Code.[32] The two interests, therefore, had to be balanced by the Government in considering the applications for the granting of the concessions according to the Minerals Act.[33] According to the preparatory work short-term economic motives shall not override essential values of public interest which depend on the land area of national interest.[34] The Government found in its balancing that the mining activities have an interest that prevails over reindeer herding. It also found that,

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[25] See a press release on this at http://sapmi.se/press-meddelande_FN-kritik.pdf (last visited April 8th 2014).

[26] See more about the international standards in the report Extractive Industries and Indigenous Peoples, A/HRC/24/41, by the Special Rapporteur on the rights of indigenous peoples, J. Anaya from July 1st 2013.

[27] See http://www.un.org/News/Press/docs//2007/ga10612.doc.htm (last visited February 19th 2014).

[28] M. Barelli, The Role of Soft Law in the International Legal System, (2011), 957-983.

[29] See the Swedish Constitution, (Regeringsformen), Chapter 2, Section 15, paragraph, 1 and the Reindeer Herding Act (1971:437), section 26. See also B. Bengtsson, Samerätt, en översikt, (2004), 91.

[30] E. Torp, Det rättsliga skyddet av samisk renskötsel, (2014), 129–130.

[31] This represents only a brief summary of the case; the appeals and the decision-making process around the current concessions. The concessions were also appealed by others but not re-examined by the Government. See the Government's decision from August 22nd 2013 with the reference numbers N2012/1637/FIN, N2012/2776/FIN and N2012/5726/FIN.

[32] The classification of an area of national interest for reindeer herding means it is of importance for reindeer herding, while classification of an area of national interest for mining means it contain valuable substances or materials, see G. Michanek and C. Zetterberg, Den svenska miljörätten, (2012), 140-141.

[33] Environmental Code (1998:808), Chapter 3, Sections 5, 7 and 10.

[34] Prop. 1997/98:45, s. 238.

even if reindeer herding is not possible in the areas in question if priority is given to the mining activities, it does not necessarily mean that the Sámi community's possibilities to pursue reindeer herding elsewhere are impeded.[35] The decision cannot be appealed and is thus final.

In September 2013, the Government's decision was individually communicated and submitted by *Vapsten* to The United Nations Committee on the Elimination of Racial Discrimination. As an interim measure of protection, *Vapsten* asked that the Committee urgently call on the State party immediately to halt the mining activities in *Rönnbäcken* until the Committee could consider whether the requested measures of protection should be retained or lifted. *Vapsten* argues that the mining activities consumes and destroys a large part of pasture areas that are indispensable for their reindeer herding and to which *Vapsten* has established property rights. *Vapsten* also argues that the issue is a result of Sweden's failure to address Sámi land and resource rights properly, despite repeated UN criticism calling on Sweden to do so.[36] In October 2013, the Committee requested the State party to suspend all mining activities in the area while the Committee considers the petitioner's case.[37]

In December 2013 and January 2014, the Swedish Government submitted observations to the Committee. The Government argued, *inter alia*, that it is not yet possible to conclude that mining activities will be commenced in the areas concerned, because an environmental permit according to the Swedish Environmental code is required, and that it is therefore too soon to assess the extent to which it will be possible to carry out reindeer herding in the area in the future. It also argued that the granting of an exploitation permit does not, in itself, have any consequences in this regard.[38]

At the time of the writing of this article, the Committee has not forwarded its suggestions and recommendations in the case to the State party and the petitioners. Although circumstances may vary in different cases, the suggestions and recommendations from the Committee will likely influence consideration of other permits and concessions affecting reindeer herding on other land areas.

5. Closing remarks

Securing seasonal-based land areas is a key issue for Sámi reindeer herders. A progressive and effectively irreversible loss of lands is probably the single greatest threat to reindeer herding in *Sápmi* today. Over time, reindeer herding has had to adapt to new and increased human activities and developments. On many of the areas where reindeer herding traditionally has been performed now exist many human activities, such as towns, industries, and different kinds of infrastructural developments. In addition many of the planned activities, such as mineral activi-

[35] Government decision; Appeal against the decision of the Chief Mining Inspector on exploitation concessions for the areas Rönnbäcken K no 1, Rönnbäcken K no 2 and Rönnbäcken K no 3 in Storuman Municipality, Västerbotten County, 10, dated 3013-08-22.

[36] *Vapsten* Sámi village's Individual communication to the United Nations Committee on the Elimination of Racial Discrimination, submitted in September 2013. See the criticism in the Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, adopted by the Committee at its eighty-third session, CERD/C/SWE/CO/19-21, August 2013. See also the Concluding observations of the Committee on the Elimination of Racial Discrimination, CERD/C/SWE/CO/18, August 2008.

[37] The reference number of the Individual Communication is G/SO 237/211 SWE (4), CE/HY/jt 54/2013.

[38] See more of the observations from the Ministry of Foreign Affairs in Sweden on 16 pages in Communication Nr. 54/2013 dated 2013-12-05 and 2014-01-22. The mining company is according to the Environmental Code, chapter 9, section 6, obliged to apply for a permit for environmentally hazardous activities.

ties, have long-term and even permanently negative impacts on reindeer grazing lands.[39]

Given the Minerals Act, the Mineral Strategy and Sweden's reputation as a prominent and long-standing mining nation, the protection of Sámi reindeer herders cultural and property rights is challenging and urgent. Reindeer herding is a crucial part of the Sámi people's culture which itself is protected by the Swedish constitution.[40] One can question the lack of protection for Sámi reindeer herders' property rights in the Minerals Act. One can also question the value of protection for land areas of national interest for reindeer herding according to the Environmental Code, when the Government in its balancing of competing interests in the *Rönnbäcken* case finds that mining have an interest that prevails over reindeer herding, even though priority shall be given to the purpose that most likely promotes sustainable management of land, water and the physical environment in general.[41]

As a result of the on-going mining plans and activities throughout *Sápmi*, such as the activities in *Gállok* and in *Rönnbäcken*, the Swedish Sámi Parliament in August 2013 made a unanimous statement, in which it demanded that the Swedish State stop all present prospecting, all new exploration permits, work plans and concession applications until Sweden lives up to its commitments regarding the rights of indigenous peoples.[42] In September 2013 the Government in a press release announced that, as part of its Mineral Strategy, it would like to increase opportunities for dialogue between the mining companies and reindeer herders. At the same time the County Administrative Board of *Norrbotten* was instructed to lead a work in developing guidance for consultations between the two parties.[43] In a press release from October 2013 the Association of Sámi reindeer herders in Sweden (SSR) expresses that the Government cannot deny their responsibility for the Minerals Act and instead blame the problems on a lack of communication between the mining companies and reindeer herders.[44]

Deficiencies in Swedish national legislation has been raised by both the Special Rapporteur on the Rights of Indigenous Peoples and the United Nations Committee on the Elimination of Racial Discrimination, which recommends that Sweden ensures respect for the right of Sámi communities to offer free, prior and informed consent whenever their rights may be affected by projects, including the extraction of natural resources, carried out in their traditional territories.[45]

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[39] Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/18/35/Add.2, June 2011, 13. See also the report Reindeer Husbandry and Barents 2030 from International Centre for Reindeer Husbandry which shows studies on loss of pastures over time in Sápmi.

[40] See the Swedish Constitution (Regeringsformen), Chapter 1, Section 2, paragraph 6 where it is stated that "The opportunities of the Sami people and ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own shall be promoted."

[41] See the Swedish Environmental Code, Chapter 3, Section 10.

[42] Statement from the Swedish Sámi Parliament, The Sámi Parliament cannot accept continued exploitation of *Sápmi*, made 2013-08-28. See also a statement made by Swedish Sámi Reindeer Herders (SSR), Sámi Council and United Nations Association of Sweden in September 24th 2013 here; http://www.fn.se/press/nyheter/sverige-ignorerar-fn-kritik-om-samers-rattigheter/ (last visited February 19th 2014).

[43] See the press release here; http://www.regeringen.se/sb/d/17742/a/222919 (last visited February 19th 2014).

[44] See the press release here; http://sapmi.se/pressmeddelande_gruvdebatt.pdf (last visited April 8th 2014).

[45] See Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/18/35/Add.2, June 2011 and recommendations in the Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, adopted by the Committee at its eighty-third session, CERD/C/SWE/CO/19-21, August 2013, 6.

Mining in Greenland and Free, Prior and Informed Consent: a Role for Corporations?

*Rutherford Hubbard**

Abstract

This paper argues that the Free, Prior and Informed Consent (FPIC) element of fundamental indigenous rights does apply to extractive industry projects in Greenland. Unfortunately, specific projects and the industry as a whole in Greenland have fallen short of meeting this requirement. This paper further argues that the ongoing failure of FPIC principles in Greenland is a source of significant corporate risk, in the form of legislative changes, retracted licenses, restricted access to project financing and reputational damages. In light these concerns, this paper sets forth the argument that a proactive corporate led approach to FPIC compliance would reduce or even eliminate this risk. While corporate-led FPIC compliance may not address the need for an improved FPIC policy on a national level, the paper concludes that corporate-led FPIC compliance would effectively counteract the direct corporate risk of non-consensual project development in Greenland.

Extractive resource projects have huge potential in Greenland, but the ongoing failure to obtain free, prior and informed consent (FPIC) from affected indigenous communities is creating significant risk for investors. This kind of "non-consensual" development can have extreme negative impacts on indigenous culture, the natural environment and the corporate bottom line. In Greenland, where indigenous peoples constitute 89 % of the population, these negative impacts are substantially magnified.[1] For extractive industries in Greenland, the nexus between project development and indigenous rights is therefore extremely relevant.

The purpose of this paper is to lay out the case for an increased role for corporations in Greenland to improve FPIC compliance in regards to the exploitation of natural resources and protect indigenous rights in practice.

To this purpose the paper identifies the specific FPIC requirements that pertain to extractive resource exploitation in Greenland, demonstrates the risk that non-consensual development creates for corporations, and discusses whether there is a legal space for corporations themselves to take on an increased role in upholding FPIC principles in Greenland.

The argument is made in four parts. Part I presents the background of extractive development in Greenland and identifies challenges in the extractive sector. Part II provides an introduction to the concept of FPIC, including the legal foundations and the role of FPIC in ensuring substantive indigenous rights in practice. Part II also identifies the enforcement of FPIC requirements as a source of

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[1] CIA Factbook; Regarding the legal recognition of the indigenous identity of the Greenlandic Peoples, refer generally and specifically to Article 33 of the Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the National Confederation of Trade Unions of Greenland (Sulinermik Inuussutissarsiuteqartut Kattuffiat-SIK) (SIK). *Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P500.2_LANG_CODE:2507219,en*

corporate risk. In Part III, the paper explores the current status of FPIC in the Greenlandic extractive industry from the perspectives of regulatory and political consultation mechanisms, determining that FPIC is not being met in regards to certain indigenous rights. Part III further identifies the specific risks that extractive industry corporation in Greenland face, as a result of non-consensual development projects. The Paper concludes in Part IV, which lays out the legal basis for an increased role for corporations in obtaining FPIC in regards to substantive indigenous rights, as well as the practical ways in which such role would mitigate corporate risk.

I. Background

a. Greenland in 2013: The year of extractive resources

Cumulative foreign investment in Greenland's extractives sector has exceeded US$1.7billion as prospectors have arrived from the US, Europe, China and Australia in pursuit of iron, oil, nickel, rubies, gold, uranium and rare earths.[2] Since 2002, exploration licenses for Greenland's resources have grown six-fold.[3] While Greenland's mineral and oil annual production remains at precisely zero, 2013 saw four developments that point towards Greenland emerging as a key player in the worldwide extractives industry, but also suggest growing discontent.

The first key development in 2013 was the surprise victory of the opposition Siumut Party in the parliamentary election, on a platform with increased participation of Greenland's indigenous community in the extractive sector.[4] Despite promises to reign in extractive development, numerous mining mega-projects continue to move forward, while contentious new legislation has opened the country to mining for rare earths and uranium.[5] To quote the Prime Minister, "Mining will come to Greenland."[6]

The second key development was the issuing of the first extraction permit approval under the Mineral Resources Act, which was granted to London Mining Co in October. The Isua Mine, London Mining's iron mining project, is expected to produce 15M dry metric tons of iron pellet feed concentrate. The Mine includes a processing facility and dedicated deep-water port.[7] Following the 2013 elections, London Mining negotiated terms with the government, which provide an escalating royalty payment that rises to 5 %.[8] Despite these minimal royalties, it is still expected that the Government of Greenland will receive over US $5 billion over the lifetime of the project.[9]

The third key development in 2013 was the narrow passage of a proposal to overturn the existing ban on mining rare earths and uranium.[10] Greenland's potential rare earth deposits

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[2] James T. Areddy, Wall Street Journal. August 22, 2103.

[3] Richard Mills, *Greenland offers exploration homerun potential,* Mining.com. August 10, 2013.

[4] *See generally* Jan M. Olsen, *Mining proponents win Greenland election,* AP (*Mar. 13, 2013),* http://news.yahoo.com/mining-proponents-win-greenland-election-085902372--finance.html; Alistair Scrutton, *Voters Deliver Backlash Over Greenland's Minerals Rush*, Reuters (Mar. 13, 2013), http://www.reuters.com/article/2013/03/13/us-greenland-election-idUSBRE92907F20130313 [hereinafter *Voters Deliver Backlash*]; Palash R. Ghosh, *Greenland Election: Autonomy Comes At What Price?*, ibtimes.com (Mar. 13, 2013), http://www.ibtimes.com/greenland-election-autonomy-comes-what-price-1123789; Terry Macalister, *Greenland Government Falls as Voters Send Warning to Mining Companies*, the Guardian (Mar. 15, 2013), http://www.theguardian.com/world/2013/mar/15/greenland-government-oil-mining-resources.

[5] *Greenland votes to allow uranium, rare earths mining*. Reuters, Oct 25, 2013 1:58am.

[6] Areddy, Wall Street Journal, 2013.

[7] Michael Allan McCrae, *Greenland iron ore mine gets green light.* Mining.com. October 26, 2013.

[8] Id.

[9] Id.; Leandi Kolver, Miningweekly.com 24th October 2013.

[10] Hammond's government won the heated debate by 15-14 vote. *Greenland votes to allow uranium, rare earths mining*. Reuters, Oct 25, 2013 1:58am.

are projected to vault the country into a leading position worldwide in terms of rare earth's production.[11] With China currently dominating the world's rare earths market, Greenland's deposits could shift the worldwide balance of trade for these essential manufacturing inputs.[12]

This bill raised opposition from indigenous and environmental activists within Greenland, and from the Government of Denmark, which maintains a ban on mining uranium and retains a role in the governance of Greenland.[13]

The fourth key development was the opening of dialogue to revise the existing Mineral Resources Act. Specifically, provisions have been proposed that would limit the authority that is currently granted to projects valued at more than US$1billion.[14] Another proposal would allow companies to conclude agreements with foreign labor unions, thereby opening the country to cheap foreign labor. This would effectively bypass Greenland's high labor costs in exchange for inexpensive workers, potentially from China.[15] Although no legislation has been formerly proposed, this is clearly the next issue set to divide indigenous rights and environmental advocates from Greenland's pro mining and industry bureaucracy.

b. FPIC: No place at the table?

While the developments in Greenland's nascent extractive industry sector have come thick and fast, steadily increasing investment in Greenland's extractives has generated significant hostility. Despite the opposition party's victory in March, the promised reforms have not been sufficient to quiet the concerns of a significant segment of Greenland's indigenous population.[16]

At the core of this discontent is the persistent perception that Greenland's indigenous population, constituting 89 % of the population, has not been properly consulted regarding the use of the country's non-renewable resources.[17]

This issue extends beyond politics. Despite constituting a majority of the population, Greenland's indigenous population is entitled to certain fundamental indigenous rights under UNDRIP and enforceable under the International Labour Organization Convention 169 on the Rights of Indigenous Peoples, (ILO 169), to which and Greenland is a signatory. These fundamental rights may require that extractive industry projects in indigenous lands obtain FPIC from the affected communities. Yet, in practice these rights are not available.[18]

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[11] Id.

[12] According to European Commission data, Greenland has "especially strong potential in six of the fourteen elements on the EU critical raw materials list." Cecilia Jamasmie, *Greenland to revise polemic mining law.* Mining.com. October 16, 2013.

[13] Id. Esmarie Swanepoel, *Greenland cuts Kvanefjeld cost to $810m.* Miningweekly.com. 26th March 2013; "Polls suggest a majority of Greenlanders agree with Mrs. Hammond that mining offers the best chance to spur the economy and ultimately wean Greenland from Danish economic support. But in the lead-up to Thursday's vote on the 25-year-old prohibition on uranium, Mrs. Hammond and other legislators, wearing colorful traditional dress, faced rare protests in the capital Nuuk from anti-mining demonstrators", James T. Areddy & Clemens Bomsdorf. *Greenland Opens Door to Mining.* Wall Street Journal Online. Oct. 25, 2013.

[14] Id.

[15] Jamasmie, Mining.com. October 16, 2013.

[16] Nunavummiut Makitagunarningit, Greenlanders Protest Uranium Mining. September 13, 2013; Greenland's green light for uranium extraction sparks environmental concerns. Euronews, October 2013, Available at: http://www.euronews.com/2013/10/25/greenland-s-green-light-for-uranium-extraction-sparks-environmental-concerns/.

[17] *Supra*, Note 4.

[18] *See generally*, Infra, Part III.

II. Fpic, Indigenous Rights and Extractive Resources

a. Legal Foundation

(i) Underlying foundation

The concept of FPIC itself is an element of two legal principles: the fundamental right to self-determination of indigenous peoples and the property rights of indigenous peoples.[19]

The right to self-determination of indigenous peoples is based in the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economical Social and Cultural Rights (ICESCR) through common Article 1.[20]

The property rights of indigenous peoples are also derived from the ICCPR and ICESCR particularly through common Article 1, which states all peoples have the right to "…for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law."[21]

Despite deriving from the same fundamental principles, the indigenous right to FPIC regarding self-determination is fundamentally different from the indigenous right to FPIC to the alienation of indigenous property. While the former is harder to enforce in practice, the latter is more likely to be enforceable in court.[22]

For example, the Committee on the ICESR has explicitly recognized the right to FPIC concerning indigenous property rights. In a 2001 report, the Committee noted that FPIC principles should be applied when dealing with indigenous claims over timber, soil or subsoil mining projects and on any public policy affecting them."[23] In 2002, the Committee called on Colombia to achieve prior and informed consent from indigenous peoples affected by resource extraction.[24] A 2004 statement from the Committee expressed "deep[ly] concern[ed] that natural extracting concessions have been granted to international companies without the full consent of the concerned communities."[25]

(ii) FPIC and fundamental indigenous rights

FPIC is key element of the fundamental and universally recognized right to self-determination and the indigenous right to property, as expressed in the non-binding UNDRIP and the binding right to consultation found in ILO 169.

The right to FPIC as a derivative of the right to self-determination is expressed in UNRIP as the right to "freely determine… political status and freely pursue… economic, social and cultural development," and the right to autonomy or self-government in matters relating to their internal and local affairs…"[26] FPIC applies specifically to the right "to maintain, protect and develop the past, present and future manifestations of their cultures," as well as in regards to

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[19] McGee, Berkeley Journal of International, Law, Vol. 27, Iss. 2, 2009.

[20] International Convention on Civil and Political Rights, *United Nations Treaty Series* at 999 U.N.T.S. 171. Article 1; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Article 1.

[21] Id.

[22] For a detailed discussion on the connection between the right to self-determination and the indigenous right to FPIC, *see infra*, section II.a.ii.

[23] The UN Committee on Economic, Social and Cultural Rights on report of Columbia in relation to traditional lands (E/C.12/I/Add. 74, para. 12).

[24] .N. High Comm'r. for Human Rights, Committee on Economic, Social and Cultural Rights [CESCR], Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia, ¶ 12 and 33, U.N. Doc. E/C.12/1/Add.74 (Dec. 6, 2007); McGee, Berkeley Journal of International, Law, Vol. 27, Iss. 2, 2009

[25] E/C.12/1/Add.100, (para. 12).

[26] UNDRIP, Articles 3 and 4.

legislation and administrative measures effecting indigenous peoples.[27]

These rights are clearly influenced by Article 7.1 of ILO 169, which reads in the pertinent part,

> The [indigenous] peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development, which may affect them directly.

These rights are referred to hereafter as the fundamental indigenous right to self-determination, although it is a limited fundamental right, as described above.

UNDRIP address the issue of FPIC and natural resources directly in Articles 10 and 29.[28] In addition to specific FPIC references, UNDRIP's emphasis on self-determination in regards to control over land and resources, in UNDRIP Articles 26 and 27. This can be understood as reenforcing the value of FPIC in regards to the core human rights of indigenous peoples.

The right to FPIC over the alienation of property is based in UNDRIP Article 10 and 29, which guarantee the right to FPIC regarding forced relocation and the conservation of natural resources. I regards to proposed mining activities, Articles 10 and 29 are not directly equivalent to a right to FPIC over the use of indigenous resources and land.[29] In practice however, the right to FPIC in regards to forced relocation and conservation is likely to form an effective check on any proposed exploitation of natural resources.

UNDRIP is a soft law declaration and as such is non-binding and cannot be enforced, even against signatory members, let alone corporations.[30] However, for those who promote and endorse the rights of indigenous peoples under international law, FPIC is now viewed as a derivative of the right to self-determination, and as such is both binding and enforceable as customary international law.[31] This conclusion however, remains contested.

ILO 169 predates UNDRIP by nearly two decades and reflects a slightly older consensus on the scope of indigenous rights. However, unlike UNDRIP, ILO 169 is enforceable against all signatory states, including Greenland.[32]

As a further precursor to UNDRIP, the ILO169 also embraces FPIC, but limits FPIC requirements to matters of forced relocation.[33] However, ILO 169 does emphasize the role of consultation as a bedrock principle, particularly in regards to the exploitation of natural resources on lands traditionally associated with indigenous peoples.[34]

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[27] UNDRIP, Articles 11 and 19.

[28] UNDRIP; Parshuram Tamang, "An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices." Department of Economic and Social Affairs, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues. Workshop on Free, Prior and Informed Consent, January 2005.

[29] This right is found in UNDRIP Articles 8 and 26, neither of which provide a right to FPIC.

[30] UNDRIP, Preamble.

[31] Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law', 10 *Nw. J. Int'l Hum. Rts.* 54 (2011).

[32] Greenland acceded to ILO 169 when Denmark became a signatory state. *See,* International Labour Organization NormLex on ratifications by Denmark. *Available at:* http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102609

[33] ILO 169, Article 16.

[34] International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169, at Article 6.1.

ILO 169 does not provide detailed guidance regarding the procedural definition of consultation. However, Article 6.2 does state that consultation should be "in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures," the key elements of which feature properly in the judicial interpretations of FPIC.[35]

(iii) Other International recognition of FPIC requirements

The emerging international customary law consensus of FPIC as an element of the rights to self-determination and indigenous lands and resources is buttressed by other intra-national bodies. The Organization of American States (OAS) has demonstrated a strong commitment to the role of FPIC as an element of fundamental indigenous rights.[36]

The UN Committee on the Elimination of Racial Discrimination (CERD) has embraced FPIC in regards to indigenous land and resource claims. CERD "calls upon the States Parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories, and resources and where they have been deprived of their lands … or used without their free and informed consent, to take steps to return those lands and territories."[37]

In 1998, the Council of Ministers of European Union passed the Resolution on Indigenous Peoples within the Framework of the Development Cooperation of the Community and Member States. This Resolution confirmed that "*indigenous have the right to choose their own development paths, which includes the right to objects, in particular in their traditional areas.*"[38] The Resolution was reaffirmed in 2002 by the European Commission, which stated that the EU interprets the language of the resolution to be the equivalent to the FPIC requirement.[39]

Likewise, a non-binding obligation, the Rio Declaration calls on states to ensure that indigenous peoples have the right to "effective participation in the achievement of sustainable development."[40]

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[35] ILO 169, Article 6.2. Part II.c.i.

[36] The proposed American declaration on the rights of indigenous people of the Organization of American States (OAS) states that there is an enforceable right to be protected from the alienation of land and resources, as well as consent regarding relocation, and decisions regarding any plan, program or proposal affecting the rights or living conditions of indigenous peoples. Proposed American Declaration on the Rights of Indigenous Peoples (Approved by the IACHR on February 26, 1997) Available at http://www.cidh.oas.org/Indigenas/Indigenas.en.01/Preamble.htm. Articles 18 and 21; In addition, lands that have been place in conservation and that are subject to indigenous land claims may not be exploited for resources without first obtaining FPIC from the claimants. Id. See also, E/CN.4/Sub.2/AC.4/2005/WP.1 13;

[37] UN Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Canada*, 25 May 2007, CERD/C/CAN/CO/18.

[38] Council of Ministers of European Union, Resolution of Indigenous peoples within the framework of the development cooperation of the Community and the Member States. 30 November 1998.

[39] Tom Giffiths, a Failure of Accountability: Indigenous Peoples, Human Rights, and Development Agency Standards 28, 29 (2003), http://www.forestpeoples.org/documents/lawhr/ipjdevtstdsfailure_accountability-dec03_eng.pd; Brent McGee: The Community Referendum: Participatory Democracy and the Right to FPIC. Published by Berkeley Law Scholarship Repository, Vol. 27:2 19, 2009; E/CN.4/Sub.2/AC.4/2005/WP.1 23; However, it should be noted that the European Convention on Human Rights has remained silent on the issue of indigenous rights and FPIC, and as such, the resolution of the Council of Ministers has yet to influence the jurisprudence of the European Court of Human Rights. Indigenous Peoples Guidebook, Working Draft. Indigenous Peoples Worldwide ©2012.

[40] Rio Declaration on Environment and Development The United Nations Conference on Environment and Development, Having met at Rio de Janeiro from 3 to 14 June 1992; Numerous UN agencies have also embraced FPIC, with at least 10 of 19 agencies formally incorporating FPIC into their policies. These agencies include the UN Development Program (UNDP), the Committee

b. Obtaining FPIC in extractive projects

There is a clear trend towards recognizing affected indigenous communities' right to FPIC for extractive projects.[41] This reflects the growing recognition that abuses of the extractive industry sector are "one of the major problems faced by [indigenous people] in recent decades."[42] As a result, FPIC was become recognized as an essential element of the indigenous right lands and resources.[43]

In practice, the obligation of FPIC is based on the principle of good faith and in recognition that the consultation "must not only serve as a mere formality, but rather it must be conceived as "a true instrument for participation."[44] Within these overarching principles, FPIC consists of four elements (free, prior, informed and consent), which must all be met individually and collectively for the FPIC element to be satisfied.

– Free

Free means that the consultation process must be conducted in such way that allows the indigenous community to act independently. Therefore, it must be free of coercion, pressure and intimidation.[45]

The Commission in Sarayaku vs. Ecuador held that the consultation process must be more than a mere formality, rather it must be conceived as "a true instrument for participation… which should respond to the ultimate purpose of establishing a dialogue between the parties based on principles of trust and mutual respect, and aimed at reaching a consensus between the parties."[46]

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on the Elimination of Racial Discrimination, and the UN Office of the High Commissioner for Human Rights. Tamang, at 12, 18.

41 McGee, Berkeley Journal of International, Law, Vol. 27, Iss. 2, 2009.

42 Id, quoting the U.N. Commission on Human Rights' Special Rapporteur; *See also* the Preamble to UNDRIP, "Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."

43 The Kichwa Peoples of the Sarayaku community and its members v. Ecuador, Case 167/03, Report No. 62/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 308 (2004); Inter-American Court, Case of the Mayagna (Sumo) Awas Tingni Community vs. Nicaragua, Judgment of August 31, 2001; "In 2001, in its concluding observation, noted "with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem." Tamang at 12.

44 Sarayaku vs. Ecuador 186, 243.

The Forest Peoples Programme, a leading indigenous rights organization identifies the elements of FPIC as follows:

- *Free refers to the right to approve or decline a project without coercion or implied retaliation.*
- *Prior refers to the right to have sufficient time for information gathering and discussion, including the translation of materials into local languages.*
- *Informed refers to the right to have all relevant information available, reflecting all views and positions and including balanced information on project risks and benefits.*
- *Consent refers to the right to reach agreement with the full participation of authorized leaders, representatives, or decision-makers as decided by the Indigenous Peoples themselves.*

Available at; http://www.forestpeoples.org/guiding-principles/free-prior-and-informed-consent-fpic; The UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, Twenty-third session 18–22 July 2005 (E/CN.4/Sub.2/AC.4/2005/WP.1) states:

– *In relation to development projects affecting indigenous peoples' lands and natural resources, the respect for the principle of free, prior and informed consent is important so that:*
– *Indigenous peoples are not coerced, pressured or intimidated in their choices of development;*
– *Their consent is sought and freely given prior to the authorization and start of development activities;*
– *indigenous peoples have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being;*
– *Their choice to give or withhold consent over developments affecting them is respected and upheld.*

45 Tamang at 48.

46 Sarayaku vs. Ecuador 186. 239, 240.

– Prior

Prior refers to the principle that consultation must take place throughout the project development process and ensure that the affected communities actually have the opportunity not to grant consent.[47] This also means that consent must be granted prior to development activities in order to avoid compelling consent in violation of the principle of free consent discussed above.[48]

Article 15(2) of ILO Convention No. 169 clarifies the purpose of prior consultation as follows: "governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any program for the exploration or exploitation of such resources on their lands."[49] In practice, this means that consultation should occur during the earliest stages of development.[50]

– Informed

Access to information is often a substantial challenge for the effective implementation of FPIC requirements. Required information must go beyond a description of the project and include the potential social and economic impacts.[51]

In Sarayaku, the Commission described this information requirement as "clear, sufficient and timely information on the nature and impact of the activities to be carried out and on the prior consultation process."[52] The Commission stressed the importance of information so that indigenous peoples understand "potential risks of the proposed development or investment plan, including the environmental and health risks."[53]

– Consent

Consent and effective consultation are distinct, but interrelated concepts within the context of FPIC. While consultation is the process by which consent is achieved, right of consent is defined as the "choice… [of indigenous communities]… to give or withhold consent over developments affecting them."[54] A detailed analysis of consent is beyond the scope of this article, but the following is a list of some of the key issues that must be addressed for consent to be effective:

- Scope of the proposed activity consented to;
- The parameters of the affected community;
- The mechanism by which the community grants consent;
- The time horizon for which consent will be effective, and
- Any mechanisms by which consent can be revoked if the project has unanticipated impacts.[55]

In Sarayaku, the Commission emphasized the importance of respecting the "particular consultation system of each people or community," taking into account, "culturally appropriate procedures."[56]

c. Enforcement of FPIC as a source of Corporate Risk

In practice, the judicial enforcement of FPIC principles remains inconsistent. However, for extractive industry corporations, the risk of *ef-*

[47] Sarayaku vs. Ecuador 178.
[48] Tamang at 48.
[49] Sarayaku vs. Ecuador, 236.
[50] Sarayaku vs. Ecuador 237.
[51] Tamang at 48.
[52] Sarayaku vs. Ecuador 126.
[53] Sarayaku vs. Ecuador 208.
[54] Tamang, at 46.
[55] It is useful to compare these issues to the Guiding Principles and R2R Framework. If the Guiding Principles have been properly implemented, these issues will likewise be addressed as part of the consultation process, thereby ensuring effective implementation of FPIC.
[56] Sarayaku vs. Ecuador 165. 263.

fective enforcement is very real. Specifically, the FPIC requirement in regards to the exploitation of natural resources is enforced through specific international and domestic courts, the lending conditions of international financial institutions, responsive changes to regulatory frameworks and the reputation effects of public and private pressure groups.

(i) Court enforcement

The judicial enforcement of FPIC requirements has remained primarily a matter of international courts, and as such primarily concerns the states against which it can be enforced. However, enforcement against states does have significant implications for corporate entities as well, in terms of project cancellations, sanctions and fines.

The Inter-American Court of Human Rights has led the way by repeatedly enforcing the FPIC element of fundamental indigenous rights.[57] In three key decisions, the Inter-American Commission has repeatedly emphasized the link between consultation and the right of indigenous communities to FPIC over the use of their lands and resources.[58]

The Mayagna Sumo Awas Tingni Community Case, decided in 2001, found for the Awas Tingi Community, citing the right to property in Article 21 of the Inter-American Convention on Human Rights. (IACHR).[59] The Commission rejected the idea of tacit consent, thereby endorsing a positive consent requirement on the alienation of indigenous lands and resources.[60]

In the case of Sarayaku vs. Ecuador, the Commission strengthened the legal position of FPIC by identifying the criteria by which indigenous land and resources claims should be measured.[61] It also identified the connection between UNDRIP and ILO 169 regarding the property rights of indigenous peoples protected by Article 21 of the IACHR.[62] In addition, the decision clearly established the right to free, prior and informed consultation and confirmed the link between the protection of natural resources and the right to use territory.[63]

The African Commission on Human and People's Rights has also upheld the right of indigenous peoples to consent to the use of resources in their territories. In the Ogoni Case, the Commission concluded that the Government had not met its responsibility to "involve the Ogoni communities in the decisions that affected the development of Ogoniland," nor did it enforce the right of the Ogoni communities to "freely dispose of [their] natural wealth."[64]

FPIC has also begun to make its way into the courts of a limited number of states. For exam-

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[57] E/CN.4/Sub.2/AC.4/2005/WP.1 17; James Anaya, "Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Land and Resources", paper presented at American Association of Law Schools Conference, January 2005; The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001). Available at, http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html; See also, Supra. Note 43.

[58] Id.

[59] The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001). Available at, http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html

[60] Id.

[61] Sarayaku vs. Ecuadaor, 148; In this regard, the Committee further referenced the *Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs,* para. 154, and *Case of the Xákmok Kásek Indigenous People v. Paraguay,* para. 113.163; *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* para. 132, and *Case of the Xákmok Kásek Indigenous People v. Paraguay,* para. 113.

[62] Sarayaku vs. Ecuador, 215, 282-3, 161; In this regard, the Committee further referenced *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs,* paras. 125 to 130; *Case of the Saramaka People v. Suriname, Preliminary objections, merits, reparations and costs,* paras. 93 and 94, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay,* paras. 117.

[63] Sarayaku vs. Ecuador 146.

[64] E/CN.4/Sub.2/AC.4/2005/WP.1 18.

ple in Belize, the Supreme Court has recognized UNDRIP as binding in requiring informed consent from indigenous peoples for any acts that "might affect the indigenous peoples' enjoyment of their land."[65]

(ii) Lending policies of financial institutions

Unlike the state-centric focus of international court enforcement, international financial institutions have begun to enforce FPIC requirements through lending policies, which apply directly to the private sector.[66] Most importantly, some international financial institutions include FPIC principles in their loan conditions.[67] Therefore, projects that do not obtain FPIC from affected indigenous communities may not be able to obtain project funding.

For example, the International Finance Corporation (IFC) has identified the need to recognize the rights and needs of indigenous communities in its Performance Standards.[68] The IFC also requires "broad community support" for projects that are likely to have significant impacts on those communities.[69]

The Asian Development Bank (ADB) requires informed consent for any resettlement of indigenous peoples, prior to approving any project funding.[70] Likewise, the European Bank for Reconstruction and Development (EBRD) requires that all companies obtain free, prior and informed consent from any indigenous peopled affected by EBRD funded projects.[71]

The World Bank (WB) has taken a more cautious approach to requiring FPIC, although the Bank's Safeguard Policies include an FPIC requirement for all WB and IFC supported projects.[72] However, for requisite environmental assessments, affected indigenous and non-indigenous communities need to be consulted, but it is not necessary to obtain consent.[73]

(iii) Responsive changes to the regulatory frameworks

The mounting opposition to non-consensual development is likely to affect the development of laws and regulatory frameworks that will directly affect business enterprises in the future.[74] In Greenland, this link has been clearly estab-

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[65] Coy v. Belize, Claim No. 171, Supreme Court of Belize (18. Oct. 2007), available at http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf.

[66] Amy K. Lehr and Gare A. Smith, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges,* a Lehr and Smith e-book, July 2010.

[67] Lehr and. Smith.

[68] "IFC's Performance Standards on Social & Environmental Sustainability Performance," IFC (2006), p. 28. ¶ 1, available at http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf

[69] Lehr and Smith, at 31.

[70] "Involuntary Resettlement: Operation Policy and Background Paper," IADB (October 1998.), p. 2, available at http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=362109; "Operational Policy on Indigenous Peoples," IADB (22 Feb. 2006), ¶ 4.4 (iii), available at http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=691261.

[71] Lehr and Smith, "The Policy's Performance Requirement 7, "recognizes the principle, outlined in the U.N. Declaration on the Rights of Indigenous Peoples, that the prior informed consent of affected Indigenous Peoples is required [for specified project-related activities], given the specific vulnerability of Indigenous Peoples to the adverse impacts of such projects." at 35.

[72] Lehr and Smith, at, 30; Tamang, at 38.

[73] World Bank Safeguard Policies, OP 4.01 – Environmental Assessment, The World Bank Group (January 1999), available at: http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064724~menuPK:64701637~pagePK:64709096~piPK:64709108.~theSitePK:50218.4,00.html; This split highlights concerns expressed by WB management that FPIC has not yet reached the status of international customary law and may be viewed as infringing on sovereign rights of governments. Tamang, at 38.

[74] Jonathan Bonnitcha, *The U.N. Guiding Principles on Business and Human Rights: The Implications for Enterprises and Their Lawyers*, Bus. & Hum. Rts. Rev., Autumn 2012, at 15.

lished.[75] A public debate on revising the mining law to reduce the influence of corporations on the licensing process is actively ongoing and points towards a more restrictive licensing process in the near future.[76] Although the final outcome of that process is unclear, the lack of community consent to development projects could easily influence legislation in Greenland, as it already has in Mongolia and Bolivia.[77]

(iv) Reputational Risk and Emerging Private Sector Standards

Over the past decade, an evolving standard of corporate behavior vis-à-vis human rights has emerged.[78] In the context of these evolving standards, reputational risk has taken on new importance. Socially responsible investors use an investment target's FPIC compliance record as an investment criterion, while activists and advocates use FPIC non-compliance to name and shame violators.[79] In addition, banks, institutional investors, and counter-parties are increasingly demanding human rights compliance in their terms and conditions.[80] Internationally, NGOs have successfully targeted banks and other institutional investors regarding extractive industry investments in several countries.[81]

III. The Status of FPIC in Greenland

Having established that the FPIC is emerging as an element of fundamental indigenous rights recognized in customary international law and that the failure to comply with the defined FPIC requirements poses substantial risk to corporations, it is now possible to discuss the issue of FPIC compliance in Greenland. This section describes the current consultation framework in the Greenlandic extractive sector and compares this framework to the FPIC requirements. It further addresses the question of whether or not the democratic process in Greenland, as a majority indigenous state, is sufficient to satisfy FPIC requirements.

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[75] *Supra*, Note 12.

[76] Id.

[77] See e.g. Jeffrey Reeves, Resources, Sovereignty, and Governance: Can Mongolia Avoid the 'Resource Curse'? Asian Journal of Political Science. Volume 19, Issue 2, 2011; John L. Hammond, Indigenous Community Justice in the Bolivian Constitution of 2009. Human Rights Quarterly, 33 (2011) 649–681.

[78] See e.g. E/CN.4/Sub.2/AC.4/2005/WP.1 27: "The Final Report of the World Bank's Extractive Industries Review concluded that "indigenous peoples and other affected parties do have the right to participate in decision-making and to give their free, prior and informed consent throughout each phase of a project cycle. FPIC should be seen as the principal determinant of whether there is a 'social license to operate' and hence is a major tool for deciding whether to support an operation."; The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms) identified numerous examples of an emerging consensus on FPIC regarding indigenous rights, expressly recognized that the right to consultation in ILO 169 is to be interpreted as a right to FCIP regarding to development projects.

[79] Lehr and Smith, See also, U.N.G.A., Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Mapping International Standards of Responsibility and Accountability for Corporate Acts, U.N. Doc. A/ HRC/4/035 (9 Feb. 2007). See also John Ruggie, "Treaty Road Not Traveled," Ethical Corporation (May 2008.), available at http:// www.hks.harvard.edu/mrcbg/news/ruggie/Pages%20from%20ECM%20May_FINAL_JohnRuggie_may%2010.pdf.

[80] Jonathan Bonnitcha, *The U.N. Guiding Principles on Business and Human Rights: The Implications for Enterprises and Their Lawyers*, Bus. & Hum. Rts. Rev., Fall 2012, at 14, 15.

[81] *See generally* Rebecca Lawrence, *Hidden Hands in the Market: Ethnographies of Fair Trade, Ethical Consumption, and Corporate Social Responsibility*, 28 Res. Econ. Anthropology 241 (2008); For example, The International Council on Mining and Metals (ICMM), has not adopted the FPIC element of fundamental indigenous rights, but has adopted a Position Statement that has strong consultation requirements. It also identifies the possibility that a strong negative response from the consultation process may lead to the cancellation of otherwise legal projects, "ICCM Position Statement on Mining and Indigenous Peoples," ICMM (May 2008.), ¶ 9, available at http:// www.icmm.com/document/293

a. Consultation framework in Greenland

Extractive industries in Greenland are regulated by the Mineral Resources Act of 2009 (MRA).[82] The MRA states that the Government of Greenland, represented by the Bureau of Minerals and Petroleum (BMP) is the "overall administrative authority for mineral resources."[83] The BMP must submit an annual report regarding new licenses issued to the Parliament of Greenland. This is the full extent of the Greenlandic Parliaments role in the licensing process.[84]

With regards to the consultation process, the MRA contains an assumption that any extractive project will have a significant impact on nature and therefore requires consultation with the "public and authorities and organizations affected."[85] This consultation process is not defined and does not extend rights to stakeholders beyond the "opportunity to express their opinion."[86]

The MRA explicitly calls for a consultation process in association with the issuance of exploration and extraction permits, as part of the mandatory Social Impact Assessment (SIA) and Environmental Impact Assessment (EIA) processes.[87] Both of these assessments require consultation with affected groups and the public at large.[88]

[82] Greenland Parliament Act of 7 December 2009 on mineral resource and mineral resource activities (Mineral Resources Act).
[83] Mineral Resources Act Article 3.1.
[84] Mineral Resources Act Article 4.
[85] Mineral Resources Act Article 61.1.
[86] Mineral Resources Act Article 61.1.
[87] BMP guidelines – for preparing an Environmental Impact Assessment (EIA), Report for Mineral Exploitation in Greenland, Bureau of Minerals and Petroleum 2nd Edition January 2011; Guidelines for Social Impact Assessments Mining projects in Greenland. November 2009, Bureau of Minerals and Petroleum, Greenland; In practice, the BMP has required some applicants to enter into an impact benefit agreement prior to receiving a license. However, the agreement is entered into by the applicant and the BMP, not the affected community(ies). Mineral Resources Act Article 61.3–5.
[88] Mineral Resources Act Art. 61.

b. Effectiveness of Consultation Framework in Greenland

The lack of an effective mechanism by which indigenous peoples could express their right to consent to extractive industry development was the driving issue in the 2013 Parliamentary election.[89] Ongoing protests against the recent approval of the Isua mining project in Nuuk by the BMP and the narrow passage of the law permitting uranium and rare earths mining would indicate that this problem has not gone away. However, such evidence while indicative, does not conclusively demonstrate the lack of FPIC in Greenland. Rather, it is necessary to consider the existing consultation framework in Greenland and determine if it complies with FPIC obligations.

The Social Impact Assessment

The Guidelines to the SIA state, "The process of preparing a Social Impact Assessment is characterized by having a high degree of public participation. The aim is that all relevant stakeholders shall be heard in the process."[90] The SIA Guidelines identify key contextual issues for the assessment and provide specific, if limited instructions for performing the consultations.[91]

While the Guidelines call for further participation in a "timely manner" with the provision of information for non-experts, the reality is that the participation process is far from satisfying the FPIC requirements.[92]

[89] *Supra*, Note 4.
[90] SIA Guidelines.
[91] SIA Guidelines 2.1. In this way, the SIA Guidelines comply with the Guiding Principles, which emphasize context as a key pre-requisite for an effective consultation process. U.N. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 13, U.N. Doc. A/HRC/17/31; SIA Guidelines, Appendix 2: Public Participation.
[92] SIA Guidelines.

While the responsibility consultation under the SIA lies with the applicant, the government has taken an active role in organizing public consultations in conjunction with potential licensees, albeit with the applicant bears the cost.[93] Despite these changes, the consultation process under SIA has been problematic from a FPIC perspective.[94]

In practice, the SIA consultation process is generally conducted in a **free** manner. However, it is not always possible for all affected communities to participate, let alone to grant consent.[95] Often, more distant communities, if consulted at all, are only consulted once and such consultation is primarily to distribute information.[96]

There is also a lack of cultural context and allowance for cultural decision-making mechanisms.[97] A short-term public consultation wherein the applicant and/or BMP are present is not a culturally effective way to reach a consensus on project development.[98]

There is also an underlying issue with the lack of funding for effective consultation by the applicants. A culturally sensitive consultation requires significant investment.[99] In practice, consultations are underfunded, short term and do not have the budget to connect with affected communities in a meaningful way.[100]

Prior consent has not been built in to the consultation process. Consultation is required before the submission of the SIA, but there is no legal requirement to demonstrate that the consultation process actually affected the resulting SIA report. As a result, consultations are generally conducted near the end of the project approval process.[101] In practice, consultations with affected communities have not had a substantial impact on project design[102].

Access to **information** has proven to be a significant barrier to effective consultation. Given the isolated and unique project development process in Greenland, the applicant has near total control over information regarding the project.[103] There is little incentive to provide accessible, comprehensive and balanced information to affected communities. In practice, information has been provided in impossibly long and complex reports that affected communities cannot comprehend. When information is accessible, it cannot be guaranteed that it accurately portrays all perspectives.[104]

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[93] Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).

[94] Interview by Rutherford Hubbard with Anonymous Source, Indigenous Rights Activist, in Green. (Aug. 15, 2012).; Interview with Aqqalaq Lynge, Chair, Inuit Circumpolar Counsel, Greenland the Association Hingitaq 1953 (The Outcasts 1953), Thule, Green. (August 27, 2012). Interview by Rutherford Hubbard with Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).

[95] Author's personal notes taken during the Public Consultation August 27, 2012; Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).

[96] Interview by Rutherford Hubbard with Anonymous Source, Consulting Professionals, in Green. (Aug. 23, 2012); Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).

[97] Id; Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament (Aug. 26, 2012).

[98] Id.

[99] *Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).*

[100] Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament, (Aug. 26, 2012).

[101] Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).

[102] Id.; Interview by Rutherford Hubbard with Anonymous Source, Indigenous Rights Activist (Aug. 15, 2012); Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative (Aug. 21, 2012).

[103] *Id.;* Interview by Rutherford Hubbard with Anonymous Source, Indigenous Rights Activist, in Green. (Aug. 16, 2012); 172.

[104] Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament (Aug. 26, 2012); Anonymous Sources, Impact Assessment Professionals, in Green. (Aug. 17, 2012).

The language also poses a barrier to a free consultation process. Although Greenland is officially bilingual, the language of business is Danish. Yet, affected communities primarily speak Greenlandic and regional dialects, which require a local translator, well versed in the technical terminology of extractive industries.[105] This requirement is not regularly addressed in practice.[106]

The SIA process does not contemplate **consent**. Rather it is purely a consultation process whereby affected stakeholders, including communities, may comment on potential impacts. The project developer then decides how to apply this information, by either amending the project strategy or reaching an agreement with the BMP regarding cost allocation of the harm.

The Environmental Impact Assessment

The EIA consultation process is likewise not in conformity with FPIC requirements. The EIA process is nearly identical to the SIA process and the preceding analysis applies. However, there are key differences regarding the timing and the information requirements.

The Guidelines for the EIA consultation process provide for two consultations at a minimum.[107] The first, **prior** consultation is intended to identify relevant issues and concerns and publicize them in a report. The second consultation provides stakeholders with the opportunity to comment on the draft report.[108] In this regard, the EIA consultation is more in line with FPIC requirements than the SIA consultation.

In practice however, the affected communities are rarely contacted more than one time, due to the logistical costs of consultations in remote areas. Therefore, the legal framework is close to being in line with FPIC, although in practice this goal has yet to be achieved.

Conversely, Access to **information** is a specific challenge because of the nature of the EIA. Given that the EIA is strictly limited to environmental impacts, it can be the case that there is even less information available, particularly in regards to alternative project development strategies and long term implications.[109] In fact, given the recent technological advances in Arctic resource extraction, there are key issues like oil spill cleanup, for which crucial information is not available.

c. Democratic Processes as FPIC Compliance

The foregoing makes clear that the existing consultation process in Greenland does not satisfy the FPIC requirements of the fundamental indigenous rights of self-determination and property. However, it must still be considered whether democratic process in majority indigenous Greenland, are sufficient to satisfy FPIC requirements independently.

It could be argued that as a majority indigenous state, a valid democratic process would satisfy the FPIC element of the indigenous rights to self-determination and property. However, there is an inherent assumption in both UNDRIP and ILO 169 that democratic processes do not satisfy FPIC obligations, because FPIC principles only contemplate indigenous peoples who appear to be assumed a minority. For example, Article 18 of ILO 169 reads as follows:

> Indigenous peoples have the right to participate in decision-making in matters, which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to

[105] Id.
[106] Id.
[107] EIA Guidelines, at 7.
[108] EIA Guidelines, at 7.
[109] Id.

maintain and develop their own indigenous decision-making institutions.

In addition, ILO 169 uses distinctly indigenous political institutions as one of the criteria by which indigenous peoples should be defined under the convention.[110] The convention also grant indigenous persons the "right to retain their own customs and institutions," explicitly distinguishing indigenous institutions from national institutions.[111]

Analysis of UNDRIP leads to the same conclusion. Article 3 provides that indigenous peoples have the right to "freely determine their political status," "…maintain and strengthen their distinct political, … institutions" and "promote, develop and maintain their institutional structures."[112] Furthermore, Article 4 provides that in exercising their right to self-determination, "[indigenous peoples] have the right to autonomy or self-government in matters relating to their internal and local affairs."[113]

The Inter-American Commission has tacitly recognized this distinction, by discussing state obligations to structure laws and institutions in such a way that allows for consultation with indigenous peoples.[114]

Therefore, it appears that a majority indigenous, democratic state like Greenland is not anticipated by the most relevant international standards. As such, it is necessary to consider whether the current democratic institutions in Greenland in fact satisfy the FPIC requirements in regards to the indigenous rights of self-determination and property.

[110] ILO 169, Article 1.b.

[111] ILO 169, Article 8.

[112] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295 Articles 3, 4, 20, 34. (hereinafter, UNDRIP).

[113] UNDRIP Article 3, Article 4.

[114] Sarayaku v. Ecuador.126, 217.

Overview of Democratic Processes in extractive regulation

Elected officials are not directly involved in the extractive industry regulatory framework in Greenland. Rather, the BMP has exclusive control over the project development process.[115] Although this authority is granted to the BMP by the democratically elected Parliament, the BMP has complete control over licensing, and therefore over the consultation process as well.[116]

The extent of Parliamentary control over the licensing process is limited to annual oversight. The BMP is required to submit annual reports regarding extractive licensing, but the Parliament has no role in the actual licensing process.[117] Therefore, other than changing the Minerals Act, the Parliament cannot intervene in individual licensing decisions. This has created a system whereby FPIC requirements are not implemented through direct control over licensing.

In practice, this lack of electoral oversight has divorced the licensing process from popular opinion.[118] Operating independently and in close collaboration with extractive enterprises, the BMP has openly promoted extractive industry.[119]

[115] *See generally*, Mineral Resources Act. *See also*, Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, in Green. (Aug. 21, 2012); Interview with Aqqaluk Lynge, Chair, Inuit Circumpolar Counsel, in Thule, Greenland (August 28, 2012); Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament, in Green. (Aug. 26, 2012).

[116] This conclusion was drawn by from strong agreement amongst respondents in the civil society, business, academic and non-administrative government sectors.

[117] *Infra*. Note 115.

[118] See for example, the responses to the 2013 election. *Supra*. Note 4.

[119] *See also*, Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representative, in Green. (Aug. 21, 2012); Interview with Aqqaluk Lynge, Chair, Inuit Circumpolar Counsel, in Thule, Greenland (August 28, 2012); Interview by Rutherford Hubbard with Anonymous Source, Member of Parliament, in Green. (Aug. 26, 2012); As one respondent noted, "it's not that they [the BMP] are evil, they just have their ideas on how things

Democratic processes, FPIC and Self-determination

UNDRIP makes clear that the indigenous communities enjoy the right to FPIC in regards to numerous aspects of self-determination, including legislative and administrative measures and cultural expression.[120] In Greenland, the nexus of the democratic process and the permitting scheme implemented by the BMP does not appear to be based on culturally relevant indigenous decision-making processes.[121] Taking into consideration Articles 18 and 27 of UNDRIP, the disconnected relationship between the democratic process and the BMP is not equivalent to the "right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision- making institutions."[122]

From a rights perspective, this raises concerns. However, it is difficult, if not impossible, to conclude that the democratic system in Greenland fails to satisfy the indigenous right to self-determination. It is therefore useful to turn to the issue of FPIC and the indigenous right to property. Specifically, it is necessary to explore the circumstances related to extractive licensing in Greenland and the indigenous right to FPIC regarding the exploitation of natural resources.

1. Consent to natural resource exploitation is not connected to specific projects

As discussed above FPIC is required regarding decisions to exploit natural resources on indigenous lands. The licensing of extractive industry projects itself therefore should require FPIC.

However, the structure of the licensing process only provides for democratic input in two ways. First, elected officials determine the regulatory framework and license approval process. Second, elected officials conduct post-fact monitoring.[123] The democratic mechanism does not apply on a license-by-license basis. Therefore, affected communities do not have the opportunity, through elected officials or otherwise, to grant consent to the specific extractive projects that affect them. In this way, it can be determined that a centralized political structure as is the case in Greenland, cannot satisfy FPIC requirements in regards to specific projects.[124]

2. Consent to natural resource exploitation is not obtained from directly affected communities

FPIC is based on the principle that indigenous communities should have the right to consent to projects that directly affect the disposition of indigenous property.[125] Parliamentary democracy is based on the principle that the majority of nation has the right to make decisions that affect the

should happen and they implement those ideas." Interview by Rutherford Hubbard with Anonymous Source, Civil Society Representatives, (Aug. 21, 2012). Several respondents noted that the new government is a substantial improvement over the old government, which was becoming corrupt after 30 years in power. *Id.* However, the new government has not made significant changes to the civil service so the problems just discussed remain as serious as before. *Id.*

120 See *supra*, Section II.a.ii.

121 Id.

122 UNDRIP, Article 18.

123 *Supra*, Note 84.

124 Following the adoption of Home Rule, Greenland was administratively centralized four regions. While intended to reduce administrative costs and increase effective governance, in fact, this centralization has reduced the influence of marginal and peripheral communities regarding decisions that affect them generally. *See*, Frank Sejersen, Acta Borealia: A Nordic Journal of Circumpolar Societies. Volume 27, Issue 2, 2010.

125 *Supra*, Note 12.

nation. This rule of the majority over projects affecting a specific community is in direct contradiction to FPIC principles.

The regulatory framework implicitly recognizes this contradiction when it requires a consultation process prior to licensing, but as discussed above, such consultation processes are insufficient.

3. The licensing process does not address the question of the right to FPIC in regards to indigenous property rights generally

The final weakness of Greenland's democratic system vis-à-vis the FPIC principles is that the BMP does not recognize the ownership of land and resources by indigenous communities generally. While there is an ongoing debate regarding the interpretation of the Constitution of Greenland, for now, there are no legal grounds for indigenous community ownership over traditionally held or used lands and resources.[126] This directly contravenes the customary international law on indigenous ownership of land and resources.[127]

In conclusion, the democratic system in Greenland, regardless of its efficacy, does not satisfy the FPIC element of the indigenous right to property on a project-by-project basis. Therefore, it should be concluded that legal compliance in Greenland, whether with existing regulation or as defined by the democratic processes in Greenland, is not equivalent to FPIC compliance.

IV. A role for Corporations

a. Corporate Risk of FPIC non-compliance in Greenland

For corporations seeking to invest in Greenlandic extractives, the FPIC related risk generated by non-consensual project development is not hypothetical. Considering the risk parameters defined above, the following are all significant FPIC related risks in Greenland

i. Court Enforcement

This risk remains extremely limited. Greenland is not a member of any international courts. It is the only country to affirmatively vote to leave the European Community (in 1985).[128]

ii. Lending policies of financial institutions

Because of its remote location, extreme weather and the near total lack of infrastructure, extractive development in Greenland requires massive investments.[129] Non-compliance with FPIC may reduce access to capital from the international financial institutions.[130] Opposition from affected indigenous communities in Greenland that have not been consulted can undermine large scale investments, increase the cost of project financing, reduced profit margins and potentially derail projects completely. Therefore, it is necessary for corporations to address this risk parameter directly. In this final section, the paper suggests that both legally and commercially, there is a role for corporations to take on greater responsibility in obtaining free, prior and informed consent

[126] Interview with Aqqaluk Lynge, Chair, Inuit Circumpolar Counsel, Greenland the Association Hingitaq 1953 (The Outcasts 1953), Thule, Green. (August 28, 2012).

[127] Sarayaku vs. Ecuador 145; *Cf. Case* of *the Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* para. 140, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay* paras. 85 to 87.

[128] "In the referendum in Greenland on 23 February 1982 voter participation was 74.9 %. To the question whether Greenland should be in the EC, 47 % voted yes and 53 % voted no." See, http://www.eu-oplysningen.dk/euo_en/spsv/all/17/

[129] Mark Nuttall, *Self-Rule in Greenland: Towards the World's First Independent Inuit State?*, 3-4/08 Indigenous Affairs 64 (2009).

[130] *See generally, Supra* Part II.c.ii & iv.

from indigenous communities affected by their projects.

iii. Responsive changes to regulatory frameworks

The surprise 2013 victory for the opposition Siumut Party demonstrated national support for stronger participation of local communities in development planning and implementation, slowing down the licensing cost and possibly increasing royalty payments in the future.[131] The highly contentious vote to allow uranium and rare earths mining in 2013 may be a boon for investors, but its razor thin victory suggests that it could be reversed at any time.[132]

With Greenland's indigenous population expressing serious reservations about the current extractives development strategy, the future of the industry is far from clear.[133] Discussions about revising the mining law, increasing the royalty payments, and even pulling the plug on some projects already into the application process, are all a direct result of non-consensual development in the extractives sector.[134]

iv. Reputational Risk and Emerging Private Sector Standards

Extractive industries are generally insulated form reputational risk, to the extent the production of minerals, petroleum and similar are difficult to trace through to the final consumer.[135] In Greenland however, reputational risk remains relevant, for two reasons. First, as noted above in regards to international finance, the high-risk investment environment in Greenland already places limitations on project finance.[136] With highly visible human rights and environmental concerns resulting from a lack of FPIC, the opportunities for project finance are further reduced.

Second, despite its small population Greenland is a high profile investment market internationally. Serious rights violations, public protests and similar, are likely to gather significant international attention and opposition. This has been demonstrated by the extent of international press coverage of recent political and regulatory developments in Greenland over the past year.[137]

b. Legal basis for a corporate role in FPIC compliance

Before recommending that corporations take on an increased burden of achieving FPIC from affected communities, it must first be clarified that such increased responsibility will in fact satisfy FPIC element of the indigenous rights to self-determination and property.

The Inter American Commission on Human Rights, in the Sarayaku decision emphasized that FPIC obligations belonged with the state and could not be delegated to private companies, especially when the delegate is the company conducting the project.[138] The Commission has distinguished between cases wherein the delegation of authority absolves the state from responsibility from those cases whereby the delegation of authority absolves the corporate entity implementing the project.

FPIC is a substantive element of certain fundamental indigenous rights that can only be satisfied by meaningful implementation in practice.[139] FPIC is not satisfied simply by providing

131 *Supra. 4*.
132 *Supra*, Note 10.
133 *Infra*, Note 131.
134 See generally, Part I.a-b.
135 Rebecca Lawrence, *Hidden Hands in the Market: Ethnographies of Fair Trade, Ethical Consumption, and Corporate Social Responsibility*, 28 Res. Econ. Anthropology 241 (2008).
136 *Supra*, Note 122.
137 For example, *see Supra*, Note 4.
138 Sarayaku vs. Ecuador 187. 248-9.
139 *Supra,* Note 53.

a procedural element without underlying substance.[140]

Therefore, the key elements of free, prior and informed consent are not required to be obtained by any specific party, provided that FPIC is obtained in fact.[141] Indeed, the Commission in Sarayaku explicitly contemplates the possibility that a corporation could obtain meaningful FPIC, when it critiques the consultation process spearheaded by the company in question, in order to determine the liability of the state which is responsible for ensuring that the standard is met.[142]

Therefore, it is clear that the substantive quality of the consultation process as it regards the underlying fundamental right is the core issue. The Commission states that the consultation process must be a "good faith… genuine dialogue to guarantee the Sarayaku People's right to participation, but it also discouraged a climate of respect among the indigenous communities of the area by promoting the execution of an oil exploration contract."[143]

This reading of the Commission's decisions is clearly supported by UNDRIP and ILO 169, both of which emphasize the content of the consultation process over the procedure.[144] While it is clear that post-fact enforcement would only be available against the state (or in Greenland's case, not at all), the risk created by failing to obtain FPIC is likewise based on the substantive quality of the consultation process and resulting FPIC of the affected indigenous community(ies), not the procedural obligations of the state.

In fact, it would appear that where relevant, the state is not required to obtain FPIC as an element of the underlying rights, but it is required to guarantee that FPIC is obtained so that those rights are guaranteed in fact. The Commission clarifies that the state bears responsibility to "observe, supervise, monitor or participate in the process and thereby safeguard the rights of the Sarayaku People."[145] The Commission admittedly prevaricates as to the permissibility of delegating responsibility over FPIC, but it follows logically that delegation of the process must be permissible, otherwise communities that have granted truly free prior and informed consent would otherwise be able to raise a valid claim based on the fact that the consent was obtained by another party.

If consent is free prior and informed, it should not matter that such consent was obtained by a third party (in this case the corporation). To focus on the party obtaining the consent, would undermine the substantive nature of FPIC and replace it with a procedural requirement and undermine the central importance of the substantive nature of the consent. This approach has been repeatedly disavowed in international instruments and jurisprudence.

c. Towards a role for Corporations in FPIC implementation in Greenland

This paper has argued that there is a growing consensus that the FPIC element of fundamental indigenous rights does apply to extractive industry projects that affect indigenous communities and that Greenland falls far short of meeting the FPIC requirement. It has further been argued that the ongoing failure of FPIC principles in Greenland points towards significant corporate risk, in the form of legislative changes, retracted licenses, restricted access to project financing and reputational damages. Corporations in Greenland therefore must seek to mitigate this risk.

For corporations seeking a pro-active risk mitigation strategy, this paper has demonstrated

[140] *Id.*
[141] *Id.*
[142] Sarayaku vs. Ecuador 194.
[143] Sarayaku vs. Ecuador 200.
[144] *See Generally*, Part II.a
[145] Sarayaku vs. Ecuador 189.

that it is possible to delegate responsibility for FPIC implementation.[146] It is further clear that good faith FPIC implementation, spearheaded by corporate actors, can satisfy FPIC requirements.

Therefore, in consideration of the specific Greenlandic risk parameters described herein, it should be concluded that a proactive corporate approach to FPIC compliance would reduce or even eliminate the risk generated by (ii) international lenders, (iiI) responsive changes to regulatory frameworks and (iv) the reputation risk from public and private pressure groups.

While corporate-led FPIC compliance may not address the need for an improved FPIC policy on a national level, at the corporate level, it would effectively counteract the risk of non-consensual project development in Greenland.

[146] See generally, Part IV.b.

Enacting a New Mining Act in Finland – How Were Sami Rights and Interests Taken into Account?

Timo Koivurova, & Anna Petrétei***

Abstract

Due to the growing global need for minerals, mining industry has significantly expanded in the recent decades, especially in the North. In order to comply with the new needs, mining legislation in Finland has gone through important changes over the past years. One of the most fundamental changes in the legislation was to include the protection of Sami rights in the new Mining Act of 2011. The article aims to shed light on the development of the mining reform in Finland, to analyze how Sami rights were taken into consideration during the process, and to examine whether the current legislation provides effective enough protection for the Sami as an indigenous people. To obtain a valuable insight on the future prospects of mining in the Sami Homeland, semi-structured interviews were conducted with relevant parties involved from the mining industry.

In recent years, mining has become a significant issue of societal and media discussion in Finland. Multi-national companies are staking out vast areas for exploration, and have already established mining operations, which has caused much uproar in the neighboring areas.[1] Many complained before the enactment of the new Mining Act in 2011, that the previous version of 1965[2] was outdated and should be replaced as soon as possible.

During the time when the old 1965 Act was adopted, mining was a fundamentally different business in comparison to the present process. Mining was reserved only for Finnish natural and legal persons,[3] and in practice mining was done by Finns: mainly by state companies (especially the Outokumpu company) and exploration by the Geological Survey of Finland. This situation changed dramatically with Finland becoming party to the European Economic Area Agreement as a European Free Trade Association (EFTA) member (and later becoming a Member State of the European Union in 1995). This had an overall effect that all natural and legal persons in this area became eligible to conduct mining processes in Finland. In turn, this had a rapid impact on mining, for instance in the notices of reservations, which rose dramatically from 225 in 1993, to 10,125 when the EEA Agreement entered into force. A similar phenomenon took place in regard to exploration permits, the annual number having been around 200 before the entry into force of the EEA, growing in 1993 to 1,096.[4]

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[1] The list of mining and exploration companies in Finland can be found at: http://new.gtk.fi/informationservices/mining_explcomp.html (22. 04. 2014)

[2] Kaivoslaki 503/1965 (Entered into force 1 January 1966). Finnish and Swedish versions are available at: http://www.finlex.fi/fi/laki/alkup/1965/19650503 (12.10.2008).

[3] See Article 1 of the original version (ibid.), which was then later amended to include natural and legal persons in the whole European Economic Area Agreement region.

[4] Valtiontalouden tarkastusviraston toiminnantarkastuskertomukset 154/2007, on file with the author.

It can convincingly be argued that the 1965 Mining Act operated in a dramatically different setting than the current one. The idea behind the 1965 Mining Act was that natural resources were used for the benefit of the Finnish nation, and therefore a task in which state companies had an important role to play. This can be compared to the present situation where the Finnish mineral deposits are explored by multi-national companies and the minerals form only a small part of the global supply.[5] As such, the price is driven by changes in global demand. It is therefore evident that if the operating environment for mining processes has changed this dramatically, there is a need to replace the current Mining Act with a new one.

One particular concern which is studied in this article is that the 1965 Mining Act did not stipulate anything in its original form in regard to the Finnish Sami indigenous people.[6] At the time when the Mining Act was enacted, the Sami did not enjoy any special legal status. This situation has changed dramatically over the years, especially since the 1990's. Since the Sami status as an indigenous people has been guaranteed in the Finnish constitution from the 1990's,[7] and the Sami have gradually gained rights in international law as an indigenous people, it is clear that there was also a need to include their legal status and rights within the new Mining Act. The crafting of a new Mining Act started in 1999, when the then Ministry of Trade and Industry (hereinafter "the MTI") established two committees to revise mining regulations, the outcomes of which were delivered in 2003.[8] However, the work of these committees did not result in a Governmental Bill, thus a new Committee under a different composition was established in 2005 to make a proposal for a new Mining Act.

The focus of this article is to study the different versions leading to the reform of the Mining Act produced by the 1999 and 2005 Committees from the perspective of how they take into account Sami rights and interests. Given that the 2005 Committee produced a mid-report,[9] a version for commentary by stakeholders in March 2008,[10] and the final 232 page proposal that was released on 8 October 2008,[11] it will be interesting to examine what kind of differences exist among these versions from the Sami viewpoint. More importantly, we will examine the level of legal and actual protection currently enjoyed by the Sami regarding the impacts of mining, as well as the legal remedies available for them in regard to their Homeland.

In order to obtain a more extensive overview

[5] Exploration and Mining in Finland's Protected Areas, the Sami Homeland and the Reindeer Herding Area – a Guide prepared by the Finnish Ministry of Trade and Industry, page 4, MTI Publications 30/2007. Available at https://www.tem.fi/files/18154/jul30teo_eng_20A4.pdf (22. 04. 2014)

[6] The 1965 Mining Act was amended several times, although the only significant amendments were those of opening mining to natural and legal persons in the EEA area and adding references to nature and environmental protection.

[7] Section 17 (3) of the Constitution states that: "The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture". Section 121 (3) provides: "In their native region, the Sami have linguistic and cultural self-government, as provided by an Act". See the current Finnish constitution 731/1999, at http://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf

[8] See (only in Finnish): Esitys kaivoslain uudistamiseksi: Kaivoslain muutostarpeita selvittävä työryhmä Kauppa- ja teollisuusministeriön työryhmä- ja toimikuntaraportteja 2/2003; and Kaivosturvallisuussäädösten muutostarpeita selvittävän työryhmän raportti, Kauppa- ja teollisuusministeriön työryhmä- ja toimikuntaraportteja 3/2003.

[9] See at http://www.tem.fi/files/18131/KAILA_valiraportti_1.2.2006final.pdf (12.10.2008).

[10] The version is on file with the author.

[11] Ehdotus uudeksi kaivoslaiksi ja eräiden siihen liittyvien lakien muuttamisesta. Kaivoslain uudistamista valmistelleen työryhmän ehdotus Työ- ja elinkeinoministeriön julkaisuja, Konserni 26/2008, at http://www.tem.fi/files/20290/Ehdotus_uudeksi_kaivoslaiksi.pdf (12.10.2008).

and valuable insight on the future possibilities of mining in the Sami Homeland, we conducted semi-structured interviews with mining company employees, CEO's, environmental impact assessment consultants and representatives of the respective authorities in Finland, hence gathering information on first-hand experience from the relevant parties involved. Unfortunately, we were not able to secure interviews with the Sami parliament, which would have been important for our research results.[12] We were, however, able to find Sami parliament statements on the basis of which we could draw tentative conclusions as to the stance of the Parliament on issues of mining and their impacts on the Sami Homeland area.

The interviewees were asked general questions on the current and future possibilities of conducting mining operations on Sami lands; their experience (if any) on consulting with Sami people; and their opinion as to whether the new Mining Act provides strong enough protection for Sami rights.[13]

The level of the Sami rights protection under the new Mining Act is, furthermore, one of the core research areas of the Sustainable Mining, Local Communities and Environmental Regulation in Kolarctic Area (SUMILCERE) project.[14] The authors hereto consider the present work as a significant contribution to this project.

1. How Has the Mining Reform Evolved?

The 1965 Mining Act was amended several times, although the only significant amendments were those of opening mining to natural and legal persons in the EEA area, and adding references to nature and environmental protection. Work to revise the current Mining Act commenced in 1999 when the MTI established two committees, one of which was tasked with drawing up a proposal for a new Mining Act (the other focused on mining safety issues). The MTI initiated the reform process and it was continued by the new Ministry of Employment and the Economy (MEE), which started its operations as of 1 January 2008.[15] The membership and terms of reference of the committee were therefore determined by a ministry with a very favourable outlook on mining. As the National Audit Office (NAO) pointed out in its 2007 assessment, the MTI had over the years become a very pro-mining governmental ministry, a fact which did not serve the interests of having a thorough and broad discussion over how mining should be conducted in Finland.[16] To have such a reform process commenced from this sort of institutional setting is not an ideal situation, if it is to take into account the societal interests and values related to mining.

The first committee that commenced its work in 1999 was composed of a fairly diverse group of participants representing varying interests and ministries. It included a university professor of environmental law, three members who represented mining interests (Union of Rock Industry, Finnish Association of Extractive Resources Industry, and the Outokumpu company), two

[12] We made a sincere effort to interview the Sami parliament but obtained no responses, despite extensive efforts to secure these interviews.

[13] Due to the insistence of our interviewees, we have respected their requests for full anonymity. Hence, in relaying the results of the interviews, we are unable to disclose even the respective name of the authority or mining company. In general, we therefore refer to what category the actor represents and when their interview took place.

[14] Among other research questions, the project, funded by the Kolarctic ENPI CBC initiative of the European Union and being run within the period of 2013–2014, focuses on the rights of the Sami as an indigenous people in the course of mining activities. It aims at comparing the level of protection in the countries inhabited by Sami, *i. e.* Finland, Norway, Sweden and Russia.

[15] See, at http://www.tem.fi/en/ministry/history_of_the_ministry (26.1.2014).

[16] See p. 9 of the Finnish version of the assessment, supra note 3. This can be obtained only in Finnish. Esitys kaivoslain uudistamiseksi: Kaivoslain muutostarpeita selvittävä työryhmä. Kauppa- ja teollisuusministeriön työryhmä- ja toimikuntaraportteja 2/2003. Edita Publishing 2003, 135 pages.

representatives of the environmental ministry, one member of the The Finnish Landowners' Organisation and two from MTI (plus the vice-chair). The Chair was from the Geological Survey of Finland and the Committee had a total of 10 members.[17]

The Committee was assigned to update the regulations that concerned prospecting and mining (safety issues were handled by another committee). In addition to this general task, the Committee was required to take a stance on certain specific questions: 1) to clarify the legal status of material (such as waste rock) that comes out of mining (whether it is waste or a side-product to be handled within the mining site), 2) the issues related to safely managing the post-closing phase of the mine, 3) the question of renting and using the mining right.[18]

The Committee itself saw it necessary to make a proposal for a new Mining Act that would replace the 1965 Mining Act. It also perceived that in addition to the special tasks on which it was assigned to take stance, it would address the issue of modernizing the procedures, hearing the views of interested parties and clarifying the conditions for decision-making. It was provided that the Mining Act would remain as an act of law which would deal with prospecting for, examining and exploiting the minerals, and which would protect the proponent's right to exclusively mine, also in land belonging to others.[19] The Committee expressed explicitly that its primary approach to the revision of the Mining Act was based on the approach that could be characterized as a "right to livelihood".[20]

The Committee did make a proposal for a new Mining Act in 2003, with altogether 117 Articles. Chapter 3 contains grounds as to why the Committee favors particular solutions, and Chapter 4 fleshes out the text of the proposed Mining Act.[21] However, the Committee could not reach consensus on the whole proposal and thus its report includes five dissenting opinions – two from the Ministry of the Environment officials, and three from the members representing the mining industry.[22] There were altogether 108 statements to the Committee proposal from stake-holders[23] – a proposal that did not lead to any further action.

In 2005, the MTI established a new Committee to continue work on this topic – a Committee that was composed solely of civil servants. The composition was also much more limited in number and consisted of two members from the MTI (plus the chair), one from the Ministry of Social Affairs and Health, one from the Ministry of the Environment and one from the Safety Technology Authority (STA, which was under the auspices of MTI). Hence there were only five members, and the lead was more clearly in the hands of the MTI, which due to organizational changes at the beginning of 2008 was included as part of a new super-ministry – the Ministry of the Employment and the Economy (MEE). In addition, the Committee had two permanent experts, one from STA and one from the Geological Survey of Finland (both of which are under the MEE). The secretary to the Committee was also from the MEE.[24]

[17] Ibid., preface. The Committee proposal is under the name of nine persons, because one member took a leave of absence from 17 January 2001.
[18] Ibid., preface.
[19] Ibid., p. 11.
[20] Ibid., p. 12.
[21] Ibid., pp. 34–127.
[22] Ibid, pp. 131–135.
[23] NAO Assessment Report, Finnish version, p. 34, footnote 29.
[24] See the 31 January 2006 mid-report (in Finnish only), p. 2, by the Committee at http://www.tem.fi/files/18131/KAILA_valiraportti_1.2.2006final.pdf (12.10.2008).

The terms of reference of the 2005 Committee were to revise the Mining Act on the basis of the two Committee reports issued in 2003. Hence, it was this new Committee that would also deal with mining safety issues, although it was decided to establish a special division for this purpose. According to its terms of reference,[25] the committee needed to pay attention to accommodating mining and other legislation, and take into account the Constitutional law principle that regulation needs to be precise and clearly defined.[26] The Committee's term of office was set out to expire on 29 December 2006, but was extended to 30 April 2008.[27]

Although the 2005 Committee was to continue on the basis of the work done by its predecessor, it provides in its mid-report that it has not been able to do this because its predecessor had not taken into account the requirements for preparing legislation on the basis of the Finnish Constitution, which entered into force on 1 March 2000 (and for the first time merged all of the various Constitutional documents into a single document).[28] In particular, the 2005 Committee argues that the previous Committee did not take into account the requirement to secure basic rights and liberties and also the Section 80 Constitutional requirement that legislation needs to be precise and clearly defined.[29]

The 2005 Committee's approach is very different from its predecessor because it emphasizes the constitutionally guaranteed basic rights and liberties – not human rights[30] – as enshrined in Chapter 2 of the Finnish Constitution. In fact, the basic rights and liberties were already adopted in 1995 by amending the Constitution Act, and it is indeed relevant to ask why the 1999 Committee did not take into account the requirements of the Constitution when it made its proposal in 2003. It seems that the basic rights and liberties started to exert influence only gradually on law-making and law-application in Finland, especially from 2000 onwards.[31] Hence, it may very well be that the 1999 Committee commenced its work with a traditional type of law-making, whereas by the time the 2005 Committee was assigned to its task, it was already common practice to include considerations relating to basic rights and liber-

[25] Ibid., pp. 5–7.

[26] Section 80 of the Finnish Constitution is as follows: "Issuance of Decrees and delegation of legislative powers. The President of the Republic, the Government and a Ministry may issue Decrees on the basis of authorisation given to them in this Constitution or in another Act. However, the principles governing the rights and obligations of private individuals and the other matters that under this Constitution are of a legislative nature shall be governed by Acts. If there is no specific provision on who shall issue a Decree, it is issued by the Government. Moreover, other authorities may be authorised by an Act to lay down legal rules on given matters, if there is a special reason pertinent to the subject matter and if the material significance of the rules does not require that they be laid down by an Act or a Decree. The scope of such an authorisation shall be precisely circumscribed. General provisions on the publication and entry into force of Decrees and other legal norms are laid down by an Act". See the English version of the Finnish Constitution at http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf (12.10.2008).

[27] See at http://www.tem.fi/index.phtml?s=2123 (12.10.2008).

[28] Section 131 provides that "This Constitution repeals the following constitutional Acts, as amended:
(1) The Constitution Act of Finland, of 17 July 1919; (2) The Parliament Act, of 13 January 1928; (3) The Act on the High Court of Impeachment, of 25 November 1922 (273/1922); and (4) The Act on the Right of Parliament to Inspect the Lawfulness of the Official Acts of the Members of the Council of State, the Chancellor of Justice and the Parliamentary Ombudsman, of 25 November 1922 (274/1922)".

[29] See the 31 January 2006 mid-report of the Committee (in Finnish only), page 16, paragraph 6.5.1. Available at http://www.tem.fi/files/18131/KAILA_valiraportti_1.2.2006final.pdf (22.04.2014).

[30] This is a little bit odd as Section 22: "Protection of basic rights and liberties" provides that "The public authorities shall guarantee the observance of basic rights and liberties and human rights".

[31] Constitutional law professor Ilkka Saraviita's emeritus lecture in the University of Lapland, hall 2, 15.00–16.15, on 12 September 2008.

ties when an act of law was prepared. The 2005 Committee also holds that its predecessor did not take into account other legislation applicable to mining to a sufficient degree, and did not accord enough importance to legislative hierarchy. The Committee could also by-pass some of the issues that were dealt with by its predecessor because new legislation had been adopted after time at which the 1999 Committee had handed out its proposal in 2003.

The work of the 2005 Committee has taken a long time, with its original term of office having been extended from the end of 2006 to 30 April 2008. In March 2008, the MEE organized stakeholder consultations on the basis of the first draft of a Mining Act. This first draft will be used in this article as a version of comparison to the final Draft Mining Act that was handed down on 8 October 2008, and which was then developed firstly as a government bill in 2009 and finally as a new Mining Act which entered into force on 1 July 2011.

2. How Were Sami Rights Ensured During the Process?

In this part of the paper, the intention is to examine how the various versions of the new Mining Act produced by the Committees came to respect the rights of the Sami. There were various versions of the act produced by the Committees:

1. The 2006 Mid-report handed out by the 2005 Committee (Mid-report).
2. The March 2008 version of the Draft Mining Act was given to the stake-holders for them to comment to the Committee in private discussions with the MEE. This is referred to here as "the March version".
3. The Draft Mining Act was handed down on 8 October 2008 by the MEE, and which was soon to be circulated for comment (hereinafter the "Draft Mining Act").
4. Governmental Bill 273/2009.
5. The new Mining Act that revokes the old Mining Act, 621/2011.

Given that the most significant changes took place after the Sami parliament was able to offer its comments on the Draft Mining Act (March version), it is useful to compare the version that was given to stakeholders (dated 3.3.2008) and the final Mining Act of 2011, given that the 8 October 2008 draft had already been changed from the perspective of Sami rights.

The March version of the Mining Act was based on the idea that it was Sami reindeer herding (being a significant part of Sami culture and harshly affected by mining activities) that needed to be protected. This version was clearly influenced by the requirements of Article 27 of the Covenant on Civil and Political Rights,[32] especially in the way that the article had been interpreted by its monitoring body, the Human Rights Committee. This is of course no surprise, given that the Covenant had been incorporated into the Finnish legal system at the level of an Act of Parliament,[33] so it is regularly applied by the domestic courts. The Human Rights Committee has often offered the following viewpoint, especially in paragraph 7 of its General Comment No. 23:

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.

[32] The text of the Covenant is available at: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (28.2.2014).

[33] See the Decree (8/1976) by which the Covenant was incorporated at the level of an Act of Parliament in Finland, http://www.finlex.fi/fi/sopimukset/sopstek-sti/1976/19760008/19760008_1

> That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law [endnote omitted]. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[34]

The Human Rights Committee has made it clear in its case-practice, notably when giving its views on two cases that Sami had petitioned against Finland; that all states have clear procedural and substantive obligations towards indigenous traditional livelihoods and their continued vitality. First of all, indigenous peoples need to be consulted before any decisions are made that may infringe their traditional livelihoods. The Committee has also made it clear that: "[m]easures whose impact amounts to a denial of the right are incompatible with the obligations under article 27"[35]. Hence, measures (e.g. of Finland to permit mining operations) that would threaten the viability of reindeer herding in a certain area would be prohibited. Yet, as previously outlined by the Committee in its views on case No. 511/1992: "measures that have a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27".[36]

The March version is the first to contain the procedure of how to incorporate the rights and interests of Sami reindeer herding:

> 30 a § Clarifying the issues in the Sami homeland region and in the reindeer herding region.
>
> If mining is to be performed – on the basis of exploration, exploitation…permit – in the Sami homeland region or in the reindeer herding area, the mining official is obligated to negotiate on the basis of what is prescribed in article 9 § of the Sami parliament act and article 53 § of the reindeer herding act, and the official must request a statement in the way prescribed in article 56 of the Act of Skolt Sami. It is the duty of the mining authority to investigate the damages to the Sami reindeer herding, and consider possible measures to prevent or mitigate such impacts. The authority should also take into account:
>
> 1) similar permits that are in force in the vicinity of this application from the perspective of Sami reindeer herding;
> 2) The size of the areas that are – from the viewpoint of the Sami reindeer herding rights – affected by the current application;
> 3) Other ways that the close-by uses of areas impact negatively the Sami reindeer herding.
> To clarify the matter, the mining authority may organize a meeting to which the repre-

[34] General Comment No. 23: The rights of minorities (Art. 27): 04/08/1994. CCPR/C/21/Rev.1/Add.5, General Comment No. 23. (General Comments), at http://www.unhchr.ch/tbs/doc.nsf/0/fb7fb12c2fb8bb21c12563ed004df111?Opendocument

[35] *Jouni E. Länsman et al. v. Finland*, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996). Paragraph 10.3, at http://www1.umn.edu/humanrts/undocs/html/VWS67158.htm (27.1.2014).

[36] *Länsman et al. v. Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994)., http://www1.umn.edu/humanrts/undocs/html/vws511.htm (27.1.2014). See paragraph 9.4 "A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27".

> sentatives of the Sami parliament, the relevant reindeer districts, the applicant and the officers who are in charge of the administration of the land are invited.[37]

Article 36 prescribes in what cases a mining permit cannot be given:

> 36 § Obstacles to the granting of permit in the Sami homeland region and in the reindeer herding area.
>
> The prospecting permit, mining permit, gold panning permit shall not be given if the activity permitted could result in injuries and these damages cannot be substantially mitigated by permit conditions. The prohibited damages are:
>
> 1. That one permit or many permits combined, together with other land uses that influence reindeer herding would result in significant damage to Sami reindeer herding.
> 2. That it would cause significant damage to reindeer herding.[38]

Hence, the March version is clearly in line with what the Covenant requires of Finland vis-à-vis protecting Sami traditional livelihood reindeer herding, since it requires consultations and also enables the mining authority to prohibit mining if it may threaten the viability of reindeer herding. Yet, it may seem strange that Sami reindeer herding and reindeer herding done by others are protected in a similar way, with the same criterion of significant damage. This is very much due to the way reindeer herding is organized in Finland, since unlike in Sweden and Norway, reindeer herding in Finland is not an exclusive Sami livelihood. On the other hand, even though the reindeer herding act does protect reindeer herding in general terms of significant damage, the question arises as to whether Sami reindeer herding should in fact enjoy stronger measures of protection.

This and other issues were taken up by the Sami Parliament when they reacted to the March version as part of stakeholder consultations. It is evident that the Sami parliament was able to influence the content of the Draft Mining Act, since the October 2008 version was already significantly changed from the earlier March version, and it is this October 2008 version that survived to form the final new 2011 Mining Act, which reads in relevant parts as follows:

> 38 § – Clarifying the issues in the Sami homeland region and in the Skolt region
>
> The permit authority must – together with the Sami parliament, the region's reindeer herding co-operatives … – clarify the consequences from giving the prospecting permit, mining permit, and gold panning permit – to the rights the Sami hold as an indigenous people, who are entitled to uphold and develop their language and culture. The permit authority must also consider measures that could be taken to lessen or prevent these impacts.
> The permit authority must take into account:
>
> 1) Similar permits that are in force in the vicinity of this application;
> 2) The areas that are – from the viewpoint of the rights Sami possess as an indigenous people – affected by the current application;
>
> 3) Other ways that the close-by areas are used that impact negatively to the rights Sami possess as an indigenous people
>
> Moreover, all this is also relevant for mining permits that are to operate outside of the Sami homeland, but which have a significant

[37] This is laid down in p. 16 of the March version, supra note. Unofficial translation by Timo Koivurova.
[38] Ibid., p. 19. Unofficial translation by Timo Koivurova.

impact on the rights the Sami possess as an indigenous people.[39]

The absolute prohibitions as regards to the Sami indigenous rights of mining are outlined in Article 50:

> 50 § Permit cannot be given at all in the following circumstances
>
> The prospecting permit, mining permit, and gold panning permit shall not be given if:
>
> 1) one permit or many permits combined (cumulative impact) would clearly weaken the preconditions (together with other permits and other ways of using the area) for the practice of traditional livelihoods of Sami (in their homeland region) or would clearly weaken the preconditions to practice other Sami livelihoods or weaken the possibilities to uphold and develop Sami culture.
> 2) Would clearly weaken the living conditions of the Skolt Sami and the possibilities to practice livelihoods in the Skolt area.
>
> All these permits can be given, if these problems can be mitigated or erased via permit conditions.[40]

There are many positive improvements from the viewpoint of Sami protection from mining impacts provided in the new Mining Act, as compared to the old Mining Act and even to the March 2008 version. The March 2008 version was built very much on the Covenant on Civil and Political Rights and its Article 27, and focused on the protection of Sami reindeer, alongside reindeer herding in general from the impacts of mining. It also focused on the Sami homeland area, and not on the impacts that may come from mining activities that take place outside of the homeland area but have impacts in the homeland area.

The most significant change is of course, that now Sami indigenous rights are protected, not only those of Sami reindeer herding. Even if Sami reindeer herding will still be the central focus of protection in the Mining Act, the Sami culture is now protected in broader terms, given that mining often causes various kinds of social, cultural and economic influences in the near-by areas, which may very well weaken the basis for overall Sami culture. The use of the term "Sami indigenous rights" is also important, given that Sami indigenous rights have progressed rapidly and will likely continue to do so in the future. In using a generic concept of "indigenous rights", the Mining Act provides conceptual openness for change in light of the evolving law relating to indigenous peoples. Another interesting addition is the protection of Sami indigenous rights also from impacts arising from outside of the Sami homeland region. It is hence easy to conclude that the Sami parliament was able to influence the Committee in its work in drafting a new Mining Act. Now their rights are extremely well protected against any adverse impacts from mining, at least in regard to the law.

3. Does the New Mining Act Also Protect the Sami in Reality From the Impacts of Mining?

As examined above, it is clear that the new mining act is almost the exact opposite from the old 1965 Mining Act which did not even mention the Sami. Even if many other pieces of legislation (such as the Sami Parliament Act that requires negotiations with the Sami parliament) were applicable before the new mining act, it is clear that by including strong legal protection inside the new Mining Act, Sami legal protection against

[39] Kaivoslaki (Mining Act) 10.6.2011/621, see at http://www.finlex.fi/fi/laki/ajantasa/2011/20110621?search%5Btype%5D=pika&search%5Bpika%5D=kaivoslaki (27.1.2014). Unofficial translation by Timo Koivurova.
[40] Ibid.

adverse impacts of mining has become stronger. Moreover, the new Mining Act provides strong protection for the Sami not only in their Homeland, but also in relation to those mining projects that are close to the Homeland, but which may have adverse impact on the Homeland region itself.[41]

Currently, there are few exploration and exploitation permits that have been issued to operate in the Sami Homeland region, which constitutes the northernmost municipalities of Enontekiö, Inari, Utsjoki and part of the Sodankylä municipality. The Finnish Geological Survey has a reservation within an area of the Homeland, where it wanted to conduct basic geological scientific research. However, its permit application for bedrock sampling from the land owner (Metsähallitus[42]) was rejected.[43] According to the official reasoning, the planned activities would have gone beyond "basic research", and Metsähallitus did not want to be the entity that distinguished the border between basic research and the search for minerals. Furthermore, as the area in question was both a NATURA 2000 area and a Sami Homeland area, the landowner preferred to transfer the responsibility of issuing a permit to Tukes[44], the relevant authority in mining issues.[45] In its statement 2/D.a.5/2013, the Sami Parliament has considered this an excellent decision.[46]

The main bone of contention is currently between the Sami parliament and machinery gold panning – the proponents of which have made claims and applications to Tukes. As of yet there has been no decision. The Sami do not oppose traditional panning, without machine assistance, but four machinery gold panning permits issued by the mining authority have been challenged by the Sami parliament. The Administrative Court decided in favor of the Sami,[47] therefore Tukes and the gold panning applicants have proceeded to the Finnish Supreme Administrative Court (SAC) for a final decision.[48] Of much interest is how the SAC will decide these cases since the Finnish court system in general follows closely on how the Human Rights Committee gives content to the Covenant on Civil and Political Rights. Recently, and starting from the 2009 Poma Poma[49] case, the Human Rights Committee has made it clear that it is not enough for the state to organize consultations with indigenous peoples when it comes to protecting their traditional livelihoods. Indigenous peoples need also to give their prior and informed consent before the state can proceed with projects that are damaging to indigenous traditional livelihoods. It

[41] The closest operating mines to the Sami Homeland are currently the Kevitsa, Pahtavaara, Kittilä, Hannukainen and Sokli mines, processing mostly nickel, gold, copper and phosphates. These mines are all located within a 100 km distance from the border of the Sami Homeland.

[42] The 'Forestry Board', responsible for managing state-owned land in Finland, most of which is in Lapland.

[43] Mention must be made that Metsähallitus has given permits for bedrock mapping and geochemical sampling in the area, but not for drilling, which is another form of sampling bedrock.

[44] Case number MH 199/2013/06.06.02

[45] The case has not yet ended; the Finnish Geological Survey would turn to Tukes only if it was necessary to secure the rights to minerals. Instead, it tries to apply for permit from the Metsähallitus in this ongoing project.

[46] Statement number: 2/D.a.5/2013

[47] According to the Court, Tukes has failed in the process of co-operating with the Sami Parliament in establishing the impacts of the activity and in considering measures to decrease and prevent damage, required by Section 38 of the Mining Act.

[48] Cases dn:o 2369-2372/1/13 and 2465-2468/1/13

[49] Human Rights Committee, Ninety-fifth session, 16 March to 9 April 2009, Ángela Poma Poma v. Peru, views. 27 March 2009. Paragraph 7.6.: "…The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members."

will therefore be interesting to see whether the SAC will follow this stricter stance in these gold panning cases.

4. The Future – Will there be Large-scale Mining in the Sami Homeland?

Our semi-structured interviews confirmed the strength of protection of Sami rights. Although there are no mining sites currently located within the Sami Homeland, we asked the opinion of relevant actors who are involved in mining, about the current and future possibilities of mining on Sami lands. The reader is instructed to note that despite our efforts, we were unable to secure any Sami Parliament interviews. We have therefore used Sami Parliament statements to clarify the opinion of the Sami Parliament on these issues.

Interviewees agreed that for companies, it is a very important factor as to whether the site is located on an area of Sami Homeland. Besides the obvious fact that a company needs to earn the social license to operate and has to take into consideration the local people and culture, some have shared the opinion that the strong legal protection of the Sami can hinder companies who apply for permits in these areas.[50] As in most of these cases, a Sami appeal is highly expected, and as companies would rather not risk lengthy court proceedings, they tend to plan their activities in other areas which would impose fewer impediments.[51]

Due to the lack of big deposits, there are currently no mining sites in the Finnish Sami Homeland. The representatives of mining actors presume that in the case that a rich deposit could be found in the Homeland, companies would try to apply for permits, but would be concerned about the outcome.[52] The bigger the company, the more sensitive it is to indigenous rights issues. At the same time however, it most probably has well-established ways of negotiating with local communities.[53] Big international companies with experience in consulting with indigenous peoples in other countries, would be less worried than smaller companies or those that have tried unsuccessfully to establish sufficient ways of communication with indigenous peoples (for example, in Australia and South Africa).[54] On the other hand, junior companies might not even initiate the application process due to the strong legal protection of Sami and the probability of appeal. In the case of a smaller deposit being found, many companies would rather not try to apply for permits.[55]

The majority of the interviewed persons see the core of the problem in the unclear regulation.[56] In their opinion, the wording of the Mining Act is in many areas too general, and therefore it is difficult to predict the potential future of a permit application. Companies aim at acting in full accordance to the rules, especially in sensitive mining-issues, and would rather not risk long and insecure procedures. If rules (both national and international) concerning mining activities were well-clarified, companies would feel more secure and would be less hesitant to plan their activities in Sami areas. Better defined criteria for appeal would also ensure more security for companies. From the Sami point of view, regulation on land issues and, more importantly,

[50] Environmental consultant, interviewed 13.2.2014; Mining company representative, interviewed 14.2.2014.
[51] Mining company representative, interviewed 14.2.2014.
[52] Environmental consultant, interviewed 13.2.2014.
[53] Environmental consultant, interviewed 20.2.2014; Mining company representative, interviewed 14.2.2014.
[54] Environmental consultant, interviewed 20.2.2014.
[55] Mining company representative, interviewed 14.2.2014.
[56] Representative of a relevant authority, interviewed 12.2.2014; mining authority representative, interviewed 14.2.2014.

on compensation would have to be further clarified.[57]

Besides the non-clarity of processes, many actors have expressed the opinion that the new Mining Act is "too new to work properly yet".[58] One of the biggest changes in the new Act was the transfer of the mining authority from the Ministry of Employment and Economy to Tukes, and the new authority has not yet enough experience in dealing with mining issues. Therefore, the other authorities and parties in question are also in the process of learning the permit system.[59] This was also confirmed by the Sami Parliament in their statement on their view on the implementation of the Mining Act in the Sami Homeland.[60] They also felt there was a lack of explanation on what criteria Tukes uses to assess the effects on Sami culture.

Interestingly, the interviewed persons concur in seeing the role of the media as one of the biggest problems.[61] Since different media organs usually picture mining as only a harmful activity, people tend to have a negative attitude towards mining in general. They further emphasized that this is especially true in the Arctic, where people are more sensitive about environmental issues, mostly due to climate change and the relatively strong protection of indigenous peoples. In order to gain people's acceptance, one possible solution suggested by our interviewees was that they would also have to be provided with more knowledge on the advantages of such activities.

As it stands, this may result in the unfortunate situation where the Sami people themselves might not have (according to our interviews) either enough information, or have false or incomplete information on the real effects of mining activities in their Homeland, which necessarily leads to misunderstandings between the Sami and mining companies.[62] The interviewed representatives think that if the Sami were properly informed about the real effects of mining activities, they would probably be more willing to allow mining activities in their Homeland area. Besides understanding the obvious fact that mining does harm the environment, the Sami would probably need more knowledge on the precautionary measures taken by companies. Many of our interviewees emphasized the importance of honesty towards local inhabitants. Some even went so far as to state that companies are perhaps more hesitant to plan activities in Sami areas than they actually should be, provided that they communicate honestly with the local people.[63]

Many responders supported this idea by saying that the fact that deposits may be located in the Sami Homeland does not, *per se*, hinder companies from a permit application if the company has enough experience in engaging in dialogue and negotiation with indigenous peoples.[64] Obviously however, this dialogue must be initiated at the earliest possible stage of the planning process, and communication with the local people must be transparent.[65]

Although the interviewees all agreed that more advanced consultations would help in many cases, dialogue alone cannot solve the

[57] Mining company representative, interviewed 14.2.2014.
[58] Environmental consultant, interviewed 13.2.2014.
[59] Mining company representative, interviewed 14.2.2014.
[60] Number of Statement: 584/D.a.9/2013
[61] Environmental consultant, interviewed 13.2.2014; Mining company representative, interviewed 14.2.2014; Environmental consultant, interviewed 20.2.2014.
[62] Representative of a relevant authority, interviewed 12.2.2014; Mining company representative, interviewed 11.2.2014; Mining company representative, interviewed 14.2.2014.
[63] Mining company representative, interviewed 14.2.2014.
[64] Environmental consultant, interviewed 20.2.2014; Mining company representative, interviewed 11.2.2014.
[65] Mining company representative, interviewed 11.2.2014.

whole problem.[66] Therefore, better co-operation between companies and the Sami Parliament would be much more beneficial for the future. Many actors have complained about the Sami Parliament not sending representatives to public hearings, although those are fora in which the viewpoints of different parties are discussed on a less formal basis. Because of the lack of "face-to-face" consultations with the Sami Parliament, there is no chance to present or discuss the opinion of each party and come up with a solution that would be beneficial for all.[67] This results in the situation where the Sami Parliament subsequently sends a formal (and in most cases rejective) opinion on a planned activity, even if this is not preceded by dialogue, which aims at finding consensus.[68] Furthermore, according to the interviews, Sami individuals are not always against mining, and some companies had experience where Sami persons even thanked them for initiating dialogues and giving them a better understanding of their activities.[69]

Representatives of the mining companies all emphasized the importance and value of Sami culture and heritage, and confirmed that they understood "new" issues such as mining, may be seen as posing a threat. Moreover, they are all aware that the question of mining is only a further addition to the already sensitive situation concerning the insecurity of land and cultural issues. The fundamental differences between these interests thus aggravate the possibility of measuring the impacts and benefits of mining on the Sami lands and impacts upon their culture.[70] It was acknowledged that decisions cannot always be made solely on the basis of scientific facts, when there are strong traditions, emotions and politics in the background.[71]

However, as it was further argued by the parties, there is a growing demand to maintain the wider societies' present lifestyle, and minerals are required for this purpose. As the Lapland region has proven to be rich in deposits, the Sami Homeland area is probably not an exception. Therefore, a growing pressure to mine on indigenous lands can be expected in the future.[72]

The situation in other Nordic countries with a Sami population is ambiguous. Based on the experience of our respondents, mining activities on Sami lands do exist in Sweden and Norway, indicating that it could be possible to conduct such activities on indigenous lands.[73] On the other hand, however, a harsh reaction by Swedish Sami might result in companies being reluctant to take steps in order to mine within the Homeland in Finland, for fear of similar reactions. However, the situation is obviously less serious in Finland, as long as no rich deposits are found.[74]

Most actors from the mining sector agreed that despite the possible threat imposed by mining on their culture and heritage, the Sami would need to see and understand the benefits brought

[66] Environmental consultant, interviewed 13.2.2014; Environmental consultant, interviewed 20.2.2014.

[67] Environmental consultant, interviewed 13.2.2014; Mining company representative, interviewed 14.2.2014.

[68] Some interviewees failed to see any solid and substantial reasoning of these formal opinions. For example, once the Sami Parliament argued that a company was at fault because it should have published their notification in the newspaper in the Sami language.

[69] Mining company representative, interviewed 14.2.2014.

[70] Mining company representative, interviewed 11.2.2014; Environmental consultant, interviewed 13.2.2014; Mining company representative, interviewed 14.2.2014; Environmental consultant, interviewed 20.2.2014.

[71] Environmental consultant, interviewed 13.2.2014.

[72] Mining company representative, interviewed 14.2.2014; Environmental consultant, interviewed 20.2.2014.

[73] Environmental consultant, interviewed 20.2.2014.

[74] Mining company representative, interviewed 14.2.2014.

by the mining industry.[75] According to the interviews, cases such as the two mines in Sodankylä have clearly shown that although mining is a significant change for a municipality, such changes are not necessarily changes for the worse.[76] For instance, a mining industry would provide the possibility for young Sami to stay in their home area and not be forced to move to cities in order to secure their living.[77]

Such activity could be achieved with more active co-operation between the Sami Parliament and the mining companies. According to many interviewees, it would be a significant, and probably the most important, step forward if more exploration activities were allowed in the Homeland region.[78] The lack of information on the bedrock and possible deposits currently poses one of the most problematic issues for companies.[79] By allowing more exploration, more data could be provided. Based on such knowledge it would be easier to decide whether it would be worth planning any kind of mining-related activities on Sami lands. Furthermore, the Sami would still have the right to appeal any motions in several other phases of the current system.[80]

Better co-operation would also help to abolish the current misleading stereotypes, *i.e.* that mining companies are harmful actors in the Sami Homeland, and the associated reputation of Sami people in appealing against most types of mining activities.[81] Yet, given that the Sami Parliament is against machinery gold-panning, it can be inferred that at least at present, the Sami people would oppose any large-scale mining in their Homeland.[82]

5. Concluding Remarks

The new mining Act was compiled in a fairly old-fashioned manner, in that there was practically no preceding societal discussion. On the other hand, this has also been a very Finnish way of preparing legislation, even in the case of such a societally important activity as mining. From the Sami viewpoint however, the legislation was prepared in such a way that enabled Finland's only indigenous people to inject their views and influence the preparation of the Mining Act. As discussed, the March 2008 Draft Mining Act version was significantly revised and improved from the viewpoint of Sami rights, and this was mainly due to the Sami parliament's active contribution in the stakeholder consultations.

It seems obvious that the legal protection that the Sami people now enjoy against mining and its adverse environmental and societal impacts is very strong, especially in their Homeland region and also elsewhere. It will be interesting to see what will happen with the applications to commence machine gold panning in the Sami Homeland region, given that the Supreme Administrative Court may well follow the Human Rights Committee's interpretation and decide that the consent of the Sami indigenous people is required.

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[75] Environmental consultant, interviewed 13.2.2014; Mining company representative, interviewed 14.2.2014.
[76] Mining company representative, interviewed 14.2.2014.
[77] Environmental consultant, interviewed 13.2.2014.
[78] Mining company representative, interviewed 11.2.2014.
[79] Representative of a relevant authority, interviewed 12.2.2014; Environmental consultant, interviewed 13.2.2014.
[80] Mining company representative, interviewed 11.2.2014.
[81] Environmental consultant, interviewed 13.2.2014; Environmental consultant, interviewed 20.2.2014.
[82] Moreover, besides the Sami interests, there are other important factors impeding mining in the northernmost part of Finland. National parks, wilderness reserves, Natura 2000 areas, tourism and the rights of other local people also have to be carefully taken into account.

According to our interviews, there may be interest from companies, even in large-scale mining in the Sami Homeland region. Yet currently, it seems that the Sami parliament would oppose any such effort, and given their strong legal protection, it would thus seem difficult for any large-scale mining operation to be permitted to operate in their homeland area. Currently, it seems that Sami will accept only traditional gold-panning activities in their Homeland region. The Sami currently enjoy very strong legal and tangible protection from adverse mining impacts in Finland, even if their overall legal protection cannot yet be said to be adequate. Finland has promised to ratify the ILO 169 Convention[83] concerning the rights of indigenous peoples for a very long time, including promises by the present government.[84] Time will tell however, whether the overall legal protection of the Sami people will proceed in the same direction as the legal protection afforded to them against adverse mining impacts.

[83] The text of the Convention is available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (28.2.2014).

[84] Programme of Prime Minister Jyrki Katainen's Government, 22 June 2011, p. 30. The programme is available at: http://valtioneuvosto.fi/hallitus/hallitusohjelma/pdf/en334743.pdf (28.2.2014).